TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1919

No. [redacted]51

CITY OF WINCHESTER ET AL., APPELLANTS,

vs.

WINCHESTER WATER WORKS COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

FILED NOVEMBER 15, 1917.

(26,228)

(26,228)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 761.

CITY OF WINCHESTER ET AL., APPELLANTS,

vs.

WINCHESTER WATER WORKS COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 16, 1917.

1 TRANSCRIPT OF RECORD.

United States District Court for the Eastern District of Kentucky, Covington.

No. 3064.

THE WINCHESTER WATER WORKS COMPANY, Plaintiff,

vs.

THE CITY OF WINCHESTER et al., Defendants.

TRANSCRIPT OF ORDERS.

Order.

Ent. June 30th, A. D. 1917.

By Hon. A. M. J. Cochran, Judge.

The plaintiff having filed its bill of complaint herein and affidavit of its superintendent and chief officer, C. F. Attersall showing that immediate and irreparable loss or damage will result to plaintiff by delay in giving notice of an application for an injunction herein, and the court being advised from the pleading and affidavit filed is of the opinion that defendant will, on July 1st, attempt to enforce the ordinance of June 2nd, 1916, set out in the bill of complaint, and institute prosecutions against plaintiff, its officers, servants, agents and employees for alleged violation of said ordinance, and will in-

2 terfere with plaintiff in its present charges of rates for furnishing water to the citizens of Winchester and plaintiff's enjoyment of the rights and privileges which it now has in connection with the ownership, operation and maintenance of its pipes, hydrants, water plant and other property in Winchester and Clark County, and thereby immediate and irreparable loss and damage will result to plaintiff before the motion for an injunction herein can be heard on notice.

It is, therefore, ordered and adjudged that the defendants, the city of Winchester, D. T. Matlack, M. S. Browne, H. B. Scrivener, J. D. Sousley, T. L. Nunan, William Gilbert, C. B. George, William Jones, J. N. Renaker and S. Dinelli, and each of them, be and they are now temporarily restrained from taking any steps to enforce the ordinance of June 2nd, 1916, set out in the bill of complaint herein, and from instituting any prosecution against plaintiff, its officers, servants, agents and employes for alleged violation of said ordinance, and from interfering in any way with plaintiff's present rates or charges for furnishing water to the citizens of Winchester, and from plaintiff's enjoyment of all the rights and privileges which

it has, or has enjoyed up to this time, in connection with the ownership, operation and maintenance of its pipes, hydrants, water plant and other property in Winchester and Clark County, until its motion for preliminary injunction this day filed and set for hearing at Maysville, Ky., in chambers, on the 10th day of July, 1916, is heard and disposed of and defendants, upon two days' notice to plaintiff, may appear and move the dissolution or modification of this order. This order as to temporary restraining order shall not be in force until bond in the sum of one thousand dollars is executed to pay defendant any damages they may sustain by reason thereof if same is hereafter set aside or held to have been wrongfully issued.

This June 30, 1916.

A. M. J. COCHRAN,
Judge.

Order.

Ent. & Filed July 29, 1916.

By A. M. J. Cochran, Judge.

This cause coming on to be heard on the motion of the plaintiff for a continuance of the hearing herein until August 1st, and the court having considered the affidavit filed in support of said motion, and being advised, it is now ordered that said motion be and same is sustained and the hearing of the matters herein to be submitted are set for Tuesday, August 1st, 1916.

A. M. J. COCHRAN,
Judge.

4 *Order.*

Ent. July 25th, A. D. 1916.

By A. M. J. Cochran, Judge.

This day came the plaintiff herein and by leave of court first had and obtained, now files herein an Amended Bill of Complaint and same is noted of record.

A. M. J. COCHRAN,
Judge.

Order.

Ent. August 8, A. D. 1916.

By A. M. J. Cochran, Judge.

This cause coming on to be heard the parties having appeared by counsel, the defendants asked that the motion heretofore filed to

dismiss the Bill be considered on relation to the Bill and Amended Bill—and it is ordered that said motion be considered as relating to the Bill and Amended Bill; and the court having considered said motion and being advised it is overruled and the defendants except. Thereupon the defendants filed their answer to the Bill and Amended Bill and said answer is now noted.

The plaintiff renewed its motion for an interlocutory injunction to last during the pendency of this action and the court having considered said motion upon the bill and amended bill and exhibits and upon the answer and exhibits and upon statements of counsel for the parties, it is of the opinion that said injunction should issue, provided the plaintiff execute bond with sufficient security to be approved by the clerk of the court in the sum of ten thou-
5 sand dollars covenanting to the pay to the defendant the city of Winchester, for the use and benefit of the city and for any and all the inhabitants thereof, any and all damages which they, or any of them, may sustain by reason of the issuance of said injunction, if it shall finally be adjudged to have been wrongfully issued, all of which damages are to be payable to the defendants, the city of Winchester, for the use and benefit of the several parties to whom they belong and be recoverable in one suit by and in the name of said defendants. It is accordingly ordered and adjudged that the defendants, the city of Winchester, D. T. Matlack, M. S. Browne, H. B. Scrivner, J. D. Sunley, T. L. Nunan, William Gilbert, C. B. George, William Jones, J. N. Renaker and S. Dinelli, their agents, representatives and employees be and they are hereby enjoined from taking any steps to enforce the ordinance set out in the bill herein, from instituting any prosecutions against the plaintiff, its officers, agents, servants or employees for alleged violations of said ordinance, from interfering in any way with the plaintiff's rates or charges for furnishing water to the defendant city or its citizens, and from interfering with its enjoyment of all of the rights and privileges which it has enjoyed up to this time in connection with the ownership, operation and maintenance of its pipes, hydrants, water plant, and other property in said city. And the clerk is directed, upon receiving and approving said bond, to issue the requisite order of injunction pursuant to this judg-
ment.

6 And the temporary restraining order heretofore issued herein will remain in force for the period of fifteen (15) days from this date, but no longer, within which time the plaintiff may execute the bond and cause the issuance of the interlocutory injunction herein ordered; and the court specially reserves the right to require additional bond and security of the plaintiff during the pendency of this action, if it be made to appear that the amount of the bond is insufficient to cover the damages that may be sustained by the defendant city and its inhabitants or that the security in said bond is not good and solvent.

And it appearing to the court that it is to the interest of the plaintiff and defendant that this case be speedily prepared for final hearing, having due regard to the rights of the parties, it is further

ordered that the plaintiff shall complete the taking of its evidence in chief on or before November 1st, 1916; and that the defendants shall complete the taking of their evidence on or before February 1st, 1917, and that the plaintiff shall complete the taking of its evidence in rebuttal on or before February 21, 1917. The parties will proceed upon notice given to the adverse party to take their evidence and may take their evidence before notaries public or other officers authorized to take and certify depositions under the Statute Laws of the State of Kentucky.

A. M. J. COCHRAN,
Judge.

Aug. 8, 1916.

7 *Order.*

Ent. October 7th, A. D. 1917.

By A. M. J. Cochran, Judge.

This day came the plaintiff herein and on his motion the court being advised, it is now ordered that he be allowed to withdraw from the files of this case the original inventory filed by him as an exhibit to the bill of complaint herein.

A. M. J. COCHRAN,
Judge

Order.

Ent. October 10th, A. D. 1916.

By A. M. J. Cochran, Judge.

It is now ordered that this cause be and the same is continued.

Order.

Ent. April 11th, A. D. 1917.

By A. M. J. Cochran, Judge.

It is now ordered that this cause be and same is continued.

Order.

Ent. September 13, 1917.

By A. M. J. Cochran, Judge.

It appearing that the agreement of August 10, 1916, between the parties hereto has never been filed or entered of record in this Dis-

trict Court, it is now agreed by the parties hereto that same be now entered and filed nunc pro tunc as of August 10, 1916.

J. N. BENTON,
B. R. JOUETT,
Attorneys for Plaintiff.
HAYS & HAYS,
J. M. STEVENSON,
Attorneys for Defendant.
A. M. J. COCHRAN,
Judge.

Order.

Ent. September 13, 1917.

By A. M. J. Cochran, Judge.

It appearing that plaintiff has heretofore filed its motion to dismiss the answer herein, and that the parties hereto have heretofore agreed, to-wit, on August 10th, 1916, that this cause should be submitted upon said motion and the pleadings and exhibits for the purpose of determining whether the City of Winchester has any authority, or is authorized, to fix or regulate rates by ordinance which the plaintiff herein can charge for furnishing water to the city of Winchester and its citizens, and the court having filed a written opinion herein on February 23, 1917, and for the purpose of carrying out said opinion to a final decree and putting same into effect, it is now ordered and adjudged that the answer herein be and the same is dismissed, and that the ordinance set out in the bill of complaint herein is void and of no effect, and the interlocutory injunction heretofore granted is now made permanent, and it is accordingly adjudged that the defendant, The City of Winchester, has no authority, nor is it authorized to fix or regulate rates by ordinance which the plaintiff herein can charge for furnishing water to the City of Winchester and its citizens, and it is adjudged that
9 its agents, representatives and employees be and they are hereby permanently enjoined from taking any steps to enforce the ordinance set out in the bill of complaint herein; from instituting any prosecution against the plaintiff, its officers, agents, servants or employees for violation of said ordinance; from interfering in any way with the plaintiff's rates or charges for furnishing water to the defendant city or its citizens, and from interfering with its enjoyment of all of the rights and privileges in connection with the ownership, operation and maintenance of its pipes, hydrants, water plants and other property in said city, and the bond which said Water Works Company has heretofore executed in this action is cancelled, annulled and held for naught, and said complainant and its surety in said bond are forever released and discharged from any and all liability thereunder, and it is further adjudged that the plaintiff recover of the defendants its cost herein

expended, to all of which the defendants object and except and pray an appeal to the Supreme Court of the United States.

A. M. J. COCHRAN,
Judge.

10 *Order.*

Ent. September 14, 1917.

By Hon. A. M. J. Cochran, Judge.

The above named defendant, City of Winchester, Kentucky, D. T. Matlack, M. S. Browne, H. B. Scrivener, J. D. Sousley, J. W. Wheeler, William Gilbert, C. B. George, J. D. Jones, J. N. Renaker and N. Bell Ratliff, conceiving themselves aggrieved by the order entered on the 13th day of September 1917, doth hereby appeal from said order to the Supreme Court of the United States, and they pray that this, their appeal, may be allowed: and that a transcript of the record and proceedings and papers upon which said order was made, duly authenticated, may be sent to the Supreme Court of the United States.

J. M. STEVENSON,
HAYS & HAYS,
Attorneys for Defendants-Appellants,
of Winchester, Kentucky.

Upon the foregoing application it is now ordered that an appeal be and it is allowed in accordance with the prayer aforesaid.

A. M. J. COCHRAN,
Judge.

Order.

Ent. September 14th, A. D. 1917.

By A. M. J. Cochran, Judge.

The parties plaintiff and defendants having filed a written stipulation showing the cessation of powers as Councilmen of the City of Winchester, Kentucky, of Syl Dinelli, T. L. Nunan, and
11 William Jones, defendants named in the Bill in Equity, it is now ordered that this action abate as to them: and said stipulation showing the qualification of N. Roll Ratliff, J. W. Wheeler and J. D. Jones as councilmen of the city of Winchester in place of said defendants, it is now ordered that this action be revived against said last named persons as Councilmen of the city of Winchester, Kentucky.

A. M. J. COCHRAN,
Judge.

12 Bill in Equity.

Filed June 30th, A. D. 1916.

In the District Court of the United States for the Eastern District of Kentucky.

Bill in Equity. No. 3061.

THE WINCHESTER WATER WORKS COMPANY, Plaintiff,

vs.

THE CITY OF WINCHESTER, D. T. MATLACK, M. S. BROWNE, H. B. SCRIVENER, J. D. SOUSLEY, T. L. NUNAN, WILLIAM GILBERT, C. B. GEORGE, WILLIAM JONES, J. N. RENAKER, and S. DINELLI, Defendants.

To the Honorable, the Judge of the District Court of the United States for the Eastern District of Kentucky:

Plaintiff, the Winchester Water Works Company, a corporation organized under the laws of the State of Delaware and a citizen and resident of said State, having its principal office in Wilmington therein, brings this its bill of complaint against the city of Winchester, a municipal corporation organized under and pursuant to the laws of the State of Kentucky and a citizen and resident of said State, with its principal office and place of business in said city, and against the other defendants, M. S. Browne, H. B. Scrivener, J. D. Sousley, T. L. Nunan, William Gilbert, C. B. George, William
13 Jones, J. N. Renaker and S. Dinelli, who constitute the members of the city council of said city, and D. T. Matlack, Mayor of said city, all of them being residents and citizens of the State of Kentucky.

And thereupon plaintiff states that this case is one wholly between citizens of different states, and that the subject matter thereof and the amount in controversy is of the value of more than five thousand dollars ($5,000.00), exclusive of interest and costs; that plaintiff, the Winchester Water Works Company, is a corporation duly organized and existing under the laws of the State of Delaware and is a citizen and resident of said state; that the defendant, the City of Winchester, is a municipal corporation organized under and pursuant to the laws of the State of Kentucky and is a citizen and resident of said State, and that the other defendants are all citizens and residents of the State of Kentucky.

Plaintiff states that by an act of the General Assembly of the State of Kentucky, approved May 3rd, 1890, amending an act relating to the charter of the town of Winchester, and authorizing the Board of Councilmen of the City of Winchester to contract for a supply of water to be furnished to said city and the citizens thereof, it was provided in Section 1 thereof as follows:

"That subsection fifteenth of section six of said act be, and it is hereby, so amended as to authorize the board of councilmen of said town to contract with any persons, company or corporation to supply

said town with water for all purposes, and to incur a debt or liability to pay for same, as provided in said subsection; and to levy and collect a tax on the citizens and property of said town sufficient to discharge said indebtedness or liability as taxes are now levied and collected in said town."

14

Plaintiff states that thereafter, by an act of the General Assembly of the State of Kentucky, approved May 10th 1890, a charter was granted for the organization of a corporation to be known as the Winchester Water Company, a copy of which is filed herewith and made a part hereof marked "charter" for identity. Section- 6 and 8 of said act are as follows:

Sec. 6:

"Said corporation may acquire, by purchase or lease, any personal or real property necessary or proper for the purposes of said corporation, and the right to lay pipes and aqueducts through, in or over any land necessary for its purposes, or through, in, along, or over any street or alley of said city, or public road, highway, railway, or turnpike of said county, and if said corporation and the owners and proprietors of any property, or those having control of said streets, alley, public road, highway, railway of turnpike, necessary to be used by said corporation, shall not agree upon compensation to be made to said owner or owners of said property, or to those having control of said street, alley, public road, highway, railway or turnpike, the same may be acquired by condemnation in the way and manner provided for the condemnation of property for railway or turnpike purposes under the provision of an act of the General Assembly of Kentucky entitled, "An act to prescribe the mode of condemning land for the uses of railroad and turnpike companies," approved April eleventh, one thousand eight hundred and eighty-two.

"Sec. 8:

Said corporation may sell water to such persons or corporations as it may see fit, and shall furnish water to the city of Winchester for the extinguishment of fire, cleaning streets and other purposes, upon such terms as may be agreed upon between said city and corporation.

15

Plaintiff says that by act of the General Assembly of Kentucky, approved March 18th, 1890, the legal title to all the streets and alleys in said town of Winchester was vested in the Board of Trustees and their successors in office, who were subsequently called a Board of Council.

Plaintiff states that on September 19th, 1890, the City of Winchester, at the time holding the legal title to all the streets and alleys of said town, by its proper officers, duly and legally entered into and executed a certain written contract with William Wheeler and Charles F. Parks, a partnership doing business under the firm name of Wheeler & Parks, a copy of which is filed herewith and made a part hereof, marked "Water Contract" for identity. By the terms of this contract, said city granted to said Wheeler & Parks, their associates, successors and assigns, the exclusive privilege of building, maintaining and operating in said city a system of water works for the purpose of supplying the city of Winchester and its citizens with water, and also granted to the same parties, their associates, suc-

cessors and assigns, the perpetual privilege of laying and maintaining water pipes beneath and along the surface of the highways, streets, avenues, alleys, public grounds and sidewalks of the city of Winchester, as the same then existed or might thereafter be extended, laid out or established. It was, also, provided therein that the system of water works to be constructed should be operated for the purpose of supplying the said city and its inhabitants with water for the uses therein specified; and plaintiff says that pursuant to the said grant of said privileges, said Wheeler & Parks,
16 their associates and assigns, agreed to, and did immediately thereafter, construct a system of water works consisting of reservoirs, pumping station, stand pipe, water mains, hydrants and other customary equipment in and near the city of Winchester. By the eighteenth section of said contract said Wheeler & Parks, their associates, successors and assigns, were authorized and empowered to furnish water to the citizens of the City of Winchester at not exceeding the rates enumerated in the schedule made a part of said section, said section with the rates as therein provided as follows:

"To furnish water to the citizens for domestic, manufacturing and other purposes, at not exceeding the same rates as are enumerated in the following schedule; it being provided however that water for manufacturing or mechanical purposes shall be supplied at meter rates, but for all other purposes meters shall be used only at the direction of the party of the second part.

Rates.

Dwelling Houses.

Occupied by one family, supplied by one faucet	8.00
Each additional faucet, not hereinafter specially rated	2.00
Where a house is occupied by more than one family, and all supplied by one faucet, for each family	6.00
Each family having separate fixtures in a house occupied by more than one family, will be charged the same as if living in a separate house.	
One bath tub	5.00
Each additional bath tub	3.00
One water closet, of approved kind	5.00
Each additional water closet	3.00
In all cases where hoppers or privy vaults are flushed with water from the sink, a water rate will be charged.	
Where both bath tub and water closet are used, for both	8.00
One self closing urinal, none other allowed	2.00
One set tub	2.00
Each additional tub	1.00

17 Where two faucets are used, one for hot and one for cold water, both emptying into same vessel, but one charge will be made, and the same applies to boarding houses. Provided that in no case shall the charge for the use of water by a private family, exclusive of hose and stable, exceed 25.00

Hotel, Boarding, and Lodging House.

For each bed for guests and lodgers in addition to the following rates	1.00
Supplied by one faucet	12.00
Each additional faucet	3.00
One bath tub	12.00
Each additional bath tub	3.00
One water closet of approved kind	12.00
Each additional water closet	3.00
Each self closing urinal	3.00

Stores, Offices, and Warehouses.

Requiring no more than ordinary supply of water.

First faucet	8.00
Where two tenants are supplied by the same faucet, each	5.00
Where more than two tenants are supplied, each	4.00
Water closet used by occupants of one tenement only	5.00
Water closet used by occupants of more than one tenement, for each additional tenant	4.00

For each additional faucet or water closet, half of the above rate will be charged.

For one self closing urinal in a building, occupied by one or more tenants, for each tenant 2.00

Markets, Saloons, Restaurants, and Workshops.

And for purposes not included in any other classification and not requiring more than ordinary supply of water, from $6.00 to 25.00

Public Baths.

For each tub	12.00
For each water closet	12.00
For each self closing urinal	5.00

18 Hose.

No hose is allowed unless at least eight dollars are paid for water for other purposes.

For hose not over one-quarter of an inch orifice, used for washing windows, sprinkling streets, or watering lawns, the use being limited in all cases to two hours per day, for each hose 6.00

In no case will the use of the hose be allowed between the hours of 9 P. M. and 5 A. M.

For each violation concerning the use of a hose, a fine of two dollars will be imposed, and if said fine is not paid within five days after notice, the water will be shut off.

Ornamental Fountains.

To be used not more than three hours per day, for six months in the year.

For a jet of one-sixteenth inch	4.00
For a jet of one-eighth inch	8.00

The use of water for fountain will not be allowed unless water is taken for other purposes.

Stables.

For first horse	5.00
Each additional horse	2.00
Livery club and boarding stables, for each horse	3.00

These charges include water for washing carriages, without hose.

Neat Cattle, each head	1.50

Steam Engines.

For each steam boiler working not over twelve hours per day—for each horse power	8.00

Water for steam boilers will be supplied through a meter at the discretion of the Water Co. at the regular meter rate.

Building Purposes.

For each cask of lime or cement used	0.10

Metered Water.

Meters will be allowed for mechanical or manufacturing purposes and for all other special uses, at the discretion of the Company. Meter will be furnished at the following rates—provided, however that in no case where a meter is used shall the charge be less than $15.00 per year, whether the meter registers that amount or not, and provided, also that no consumer shall be charged more for the water at any given rate than a larger quantity would cost under the schedule:

19

Meter Rate.

For quantity averaging:

Less than 1 thousand gallons per day						$0.25	per	thousand.
1 to 5	"	"	"	"	.22	"	"	
5 to 10	"	"	"	"	.20	"	"	
More than 20	"	"	"	"	.16	"	"	

Service pipes within the limits of public ways and streets to be laid by and at the expense of the Company, provided, a uniform charge not exceeding $3.00 may be established to cover the average cost of making the tap and repairing concrete paving, fences, sidewalks, etc.

Plaintiff says that the fourth paragraph of the city's obligations enumerated in said contract gave to Wheeler & Parks, their associates, successors and assigns, the right to enter in or upon lands or other property belonging to the city.

The fifth paragraph of said covenants of the city permitted said Wheeler & Parks, or such persons as they might designate, to subscribe for all the stock provided for in the act of the General Assembly creating the Winchester Water Company (that is, the act of May 10th, 1890, hereinabove referred to), and accordingly all of said stock was duly subscribed by said Wheeler & Parks and their associates and said corporation was duly organized pursuant to said legislative charter; and thereupon said Wheeler & Parks duly assigned and transferred to said corporation the aforesaid contract with the city of Winchester and all their right and privileges thereunto, as well as all the property they had acquired in Winchester and Clark County in connection with the construction and operation of its water works enterprise.

20 Thereafter, on or about November 30th, 1904, this plaintiff duly purchased, and since then has been, and is now, the owner of said contract and of all rights, benefits and privileges thereof, and said water plant and all property used in connection therewith, including the franchise for the use of the streets, alleys and other property of the city, the use of which was granted by the city to said Wheeler & Parks, and that since said date it has been in possession of and engaged in operating said water works under said contract and furnishing thereunder water to the city and its citizens for fire, domestic, manufactory and other uses.

Plaintiff states that the Board of Council of the city of Winchester, on June 2nd, 1916, passed and adopted an ordinance which is in words and figures as follows:

An Ordinance to Provide the Maximum Rates That May Be Charged by Any Person, Firm or Corporation for Water Sold or Consumed by Any Person or the City of Winchester in the City of Winchester.

Be it ordained by the Board of Council of the City of Winchester, Kentucky,

Sec. 1. That no person, firm or corporation furnishing water to the city of Winchester or its inhabitants shall charge, receive or collect a higher rate for water sold or furnished in the city than is set out in the following schedule, to-wit:

21 Dwelling Houses.

Occupied by one family supplied by one faucet	6.00
Each additional faucet hereinafter specially rated	2.00
Where a house is occupied by more than one family, for each family	5.00
Each family having separate fixtures in a house, occupied by more than one family, will be charged the same as if living in separate houses:	
One bath tub	4.00
Each additional bath tub	3.00
One water closet of approved kind	4.00
Each additional water closet	2.00
In all cases where hoppers or privy vaults are flushed with water from a sink a water closet rate will be charged:	
When bath tub and water closet are used for both	7.00
One self-closing urinal, none other allowed	1.00
One set tub	2.00
Each additional set tub	1.00
When two faucets are used, one for hot and one for cold water, both emptying into one vessel, but one charge will be made and the same applies to boarding houses, provided that in no case shall the charge for water by a private family, exclusive of hose and stable, exceed	20.00

Hotels, Boarding Houses and Lodging Houses.

For each bed for guests and lodgers	1.00
In addition to the following rates:	
Supplied with one faucet	10.00
Each additional faucet	2.00
One bath tub	8.00
Each additional bath tub	3.00
One water closet of approved kind	8.00
Each additional water closet	3.00
Each self-closing urinal	3.00

Stores, Offices, and Warehouses.

Requiring no more than ordinary supply of water, first faucet	6.00
Where two tenants are supplied by the same faucet, each	4.00
Where more than two are supplied, each	3.00
Water closets used by occupants of one tenant only	4.00
Water closet used by occupant of more than one tenant, 22 for each tenant	3.00
For each additional faucet or water closet, one-half the above rates will be charged for each self-closing urinal in a building occupied by one or more tenants, for each tenant.	2.00

Markets, Saloons, Restaurants, and Work-shops.

And for all purposes not included in any other classification and not requiring more than ordinary supply of water, from	$6.00 to 25.00

Stables.

First horse	3.00
Each additional horse	2.00
Livery stable, each addition	2.50

The foregoing rates are provided as maximum rates for the term of twelve months (12), payable quarterly in advance.

Meter Rates.

The maximum charge for water metered to any one service shall be eight dollars ($8.00) per annum, payable quarterly in advance, at the beginning of each quarter, for the consumption of the first forty thousand (40,000) gallons or less used during the year.

	Rate per M gal.
For the first 40,000 gallons per annum	0.20
For the next 150,000 gallons per quarter	0.15
For the next 300,000 per quarter	0.12
For the next 500,000 per quarter	0.08
Excess above 1,500,000 per quarter	0.7½

Provided, however, that in no case shall the annual minimum meter charge be less than $2.00 per quarter, payable in advance; and provided further that the charge at any rate shall not exceed the maximum charge at the next lower rate.

23 Fire Protection and City Public Service.

For each standard fire hydrant in use in the city payable quarterly, on the first day of July, October, January and April, after the service rendered	$30.00
For each undersized hydrant, payable as for a standard hydrant	$25.00
For water used by the city at the public school buildings, public fountains, city hall building and rock quarry and for washing the paved streets and flushing the sanitary sewers and gutters, payable quarterly at the end of each quarter, first quarter beginning April 1, 1916	$600.00

Sec. 2. That it shall be a good defense to any action brought by any person, firm or corporation against any person, firm corporation, or against the city of Winchester, Kentucky, consuming water

in the city for such consumer to show that he has paid for the water so used by him at the foregoing rate, or if payment has been refused that he tendered payment thereof in lawful money before suit was brought.

Sec. 3. That it shall be unlawful for any person, firm or corporation or any officer or agent, servant or employee thereof, engaged in supplying, furnishing or selling water to the city of Winchester, Kentucky, or for the inhabitants, thereof, to charge, demand, collect or receive for water so supplied, more than the rates hereinbefore set forth in section one, of this ordinance; and it shall be unlawful for any such person, firm or corporation, or their offi-
24 cers, agents, servants or employees to cut off or otherwise interfere with the supply or refuse to furnish a supply of water to any consumer for failure to pay any excessive charge, provided each consumer tenders in lawful money the rates aforesaid for water to be supplied; and any person, firm or corporation, officer, agent, servant or employee violating any or the provisions of this ordinance shall be deemed guilty of a misdemeanor, and upon conviction thereof before any court of *contempt* jurisdiction shall be fined not less than ten dollars ($10,00), nor more than fifty dollars ($50) for each offense.

Section 4. That it shall be unlawful for any person, firm or corporation or any officer, agent, servant, or employee thereof to charge any person, firm or corporation any greater rate for water used or consumed than is charged to any other person, firm or corporation using the same or similar quantity of water; and no special rate shall be allowed to any person, firm or corporation for the use of water in said city; and any person firm or corporation, officer, agent, servant or employee thereof who shall discriminate against any other person, firm or corporation in the price charged for water sold shall be deemed guilty of a misdemeanor and upon conviction thereof before any court of *contempt* jurisdiction shall be fined not less than ten dollars ($10,00), nor more than fifty dollars ($50,00) for each offense.

Sec. 5. That all ordinances or parts of ordinances in conflict herewith are hereby repealed; and this ordinance shall take effect and be in force from and after its passage and publication, the interest of the city demanding it.

25 Plaintiff states that the defendant, the City of Winchester, has no right, power or authority, and had none on June 2nd, 1916, to pass or adopt, or to enforce said ordinance as against this plaintiff, or to pass or adopt any ordinance which will in any wise affect or abridge the right of this plaintiff to furnish water to the citizens of Winchester at reasonable prices to be fixed by this plaintiff. Plaintiff states that said ordinance, when adopted and passed, was intended to and could apply only to it, as it is the only company or person furnishing water to the citizens of Winchester; and it further states that if said ordinance was lawfully passed it cannot be enforced or made to apply in any way to this plaintiff for the reason that plaintiff has a vested interest and property right in the streets

and alleys of said city for laying, maintaining and operating its pipes, hydrants and other property, and a vested right to furnish water to the citizens of Winchester, if furnished at rates agreed upon with said consumers, or in the absence of agreement, at reasonable rates, and it states that the rates fixed in said ordinance are unreasonably low and confiscatory, and that the enforcement of said ordinance would deprive this plaintiff of its property without due process of law, would deny to it the equal protection of the law, would confiscate its property, and would impair the obligation of its said contract with the city, all in violation of the Constitution of the United States and the Constitution of Kentucky.

Plaintiff states that under its contract with the City of Winchester its rental of the hydrants mentioned in Number 1 of the
26 city's covenants expires on the first day of July, 1916, and this plaintiff has no right or power to charge said city with the specific amounts therein prescribed after said date, nor has the city the right to use same after said date, unless a new contract can be entered into between said city and this plaintiff, but it says that it has the right to furnish water to the citizens of the city of Winchester at the rate fixed in said contract, or at any other rate which may be agreed upon between it and said citizens, provided same is reasonable and at the same time produces a fair net return to plaintiff on the value of its property.

Plaintiff says that it has the right to make such rates and charges for water as will yield a sum sufficient to pay its taxes and operating expenses, properly involved in owning and operating its said plant, and, in addition, to afford a fair and reasonable return upon the value of its property devoted to the public use, which description embraces all its property.

Plaintiff states that the rates and regulations under which it furnishes, and for many years has furnished water to the citizens of Winchester are set out in duly promulgated *pham*-let, a copy of which is filed hereith, marked "Rates and Rules," and it states that all of its said charges therein contained, as well as the rates charged the city for water for fire and other public purposes as set out in the contract hereinbefore filed as an exhibit, are just and reason-
27 able, and that the reduced rates prescribed by the aforesaid ordinance, or any other rates less than the above described rates which are now charged, would be arbitrary and unreasonably low, would not yield a fair net return upon its property, all of which is devoted to the public use, and would be confiscatory and void.

Plaintiff states that it is not through its fault that the contract with the city for water for fire and other public purposes is about to expire, as it has been ready at all times to make a new contract, but that the City Council has no authority, without an approving vote of the people, to make a contract for a term of years, and such authority has not been obtained, the election therefor in November, 1914, having failed by a few votes of carrying by the requisite two-thirds, and the Board of Council of the City of Winchester refused to call an election submitting the question to a vote at the November, 1915, election, though requested so to do.

Plaintiff states further that it is provided in said ordinance that any person, firm or corporation, officer, agent, servant or employees of plaintiff violating any of the provisions of the ordinance shall be deemed guilty of a misdemeanor, and upon conviction thereof, before any court of competent jurisdiction, shall be fined not less than ten dollars ($10.00) nor more than fifty dollars ($50.00) for each offense.

Plaintiff says that the defendant, the city of Winchester, is threatening to, and will, unless restrained by this court, enforce
28 said ordinance, and will prosecute under hundreds of warrants this plaintiff and its officers, agents, servants and employees for alleged violation of the provisions of said ordinance by charging greater rates for water service than those fixed therein; and plaintiff says that unless defendants, by the order of this court, be restrained and enjoined at once from executing and enforcing said ordinance, this plaintiff will suffer immediate great and irreparable injury, loss or damage, for which it has no adequate remedy at law. It says that no injunction has heretofore been asked for, refused or granted in this matter by any court or officer.

Plaintiff prays that your Honors grant unto it a writ of subpœna of the United States of America, addressed to the defendants, commanding them on a certain day to appear and answer to this bill of complaint, but not under oath which is waived, and to abide and perform such orders and decrees in the premises as to the court shall seem proper and required by the principles of equity and good conscience.

To the end, therefore, that plaintiff may have a due and reasonable opportunity to test its legal rights in the premises, plaintiff prays that an interlocutory injunction be issued restraining the defendants, their agents, servants and employees from taking any steps to enforce the ordinance set out and complained of in this bill, from instituting any prosecution against plaintiff, its officers, servants, agents and employees, for alleged violation of said ordinance,
29 from interfering in any way with its rates or charges for furnishing water to said city or its citizens, or its enjoyment of all the rights and privileges which it has enjoyed up to this time in connection with the ownership, operation and maintenance of its pipes, hydrants and water plant and other property in said city; and upon final hearing it prays that said injunction be made perpetual and that its rights and privileges in the premises be declared and established, and it prays for all such further and general relief as to equity and good conscience belongs.

J. M. BENTON,
B. R. JOUETT,
Counsel for Plaintiff.

Affiant, Charles F. Attersall, states that he is the superintendent and principal officer of plaintiff in Kentucky, and that the statements of the foregoing bill in equity are true as he believes.

CHAS. F. ATTERSALL.

Subscribed and sworn to before me by Charles F. Attersall, this June 29th, 1916.

NELL S. TUDOR,
Notary Public, Clark County, Ky.

30 *Amended Bill of Complaint.*

Filed July 25, 1916.

In the District Court of the United States for the Eastern District of Kentucky.

No. 3064.

THE WINCHESTER WATER WORKS CO., Plaintiff,

v.

THE CITY OF WINCHESTER, Defendant.

Now comes the plaintiff and by leave of court and for amendment to its original bill herein says that the City of Winchester, on June 2, 1916, did not have, nor has it now, any authority, power or right to pass or enforce any ordinance, fixing the rates or charges which this plaintiff shall charge the citizens of Winchester for furnishing water to them, because no power has been granted or delegated to the defendant, the City of Winchester, by the legislature of Kentucky, to fix rates which this plaintiff may charge private consumers, but plaintiff says that if this court should hold that defendant, the City of Winchester, does have the right to fix, by ordinance, the rates or charges which this plaintiff may charge for furnishing water to the citizens of Winchester, the rates or charges fixed by the ordinance of June 2, 1916, and any rates or charges, which may be fixed by any ordinance at any price, less than those now being charged the
31 citizens of Winchester, would be confiscatory, and would be taking the property of this plaintiff without due process of law, and would be denying to it the equal protection of the law, and would in effect be taking its property for public use without just compensation being made.

Plaintiff says that it has been charging the citizens of Winchester, since November 1907, for water service, the rates and charges and under the rules and regulations, which rates and charges and rules and regulations are just and reasonable, as shown in its original bill of complaint, and that during all of that time it has conducted its affairs and business prudently, skillfully and economically, and yet plaintiff says that from such prudent, careful and economical conduct of its business under said rates and charges, rules and regulations, it has been unable to produce, during said time, sufficient revenue, after payment of expenses and upkeep, to pay, and it has not paid, any dividends to its stockholders upon its capital of one hundred thousand dollars ($100,000.00). Plaintiff says that

the total revenue derived from rentals from its patrons, including the City of Winchester, for the past five years is as follows:

1911	$21,652.26
1912	22,481.93
1913	26,277.18
1914	26,966.94
1915	25,146.52

or an average $24,504.97, and plaintiff says in addition thereto it contends that the City of Winchester owes it a balance of $12,330.00, for said years on account of hydrant rentals disallowed by the city, and the city, in the suit now pending in this court for said balance, is claiming that it is not indebted to this plaintiff in any sum on that account.

2 Plaintiff says that its disbursements for said years in expenses, operation and up keep, exclusive of depreciation and renewal reserve fund and municipal taxes paid by service, have been as follows:

1911	$13,221.81
1912	14,252.17
1913	16,207.77
1914	17,318.94
1915	15,600.54

or an average of $15,320.25; that in addition to said expenditures for operating expenses and charges it paid in interest on bonds, notes and accounts constituting its outstanding indebtedness the following sums:

1911	$7,288.37
1912	7,288.76
1913	7,725.03
1914	8,216.59
1915	8,364.84

or an average of $7,776.72; and it also applied to a depreciation and renewal reserve fund, the following sums:

1911	3,000.00
1912	2,500.00
1913	3,000.00
1914	3,250.00
1915	3,000.00

or an average of $2,950.00.

Plaintiff says that all of the above mentioned disbursements were reasonably necessary and the amounts expended were fair and reasonable charges for such services and expenses in the conduct of the business.

Plaintiff says that the present fair and reasonable value of its property, all of which is used and is reasonably necessary to be used in supplying water to the City of Winchester and the citizens thereof, is not less than the sum of two hundred and eighty-seven thousand, five hundred dollars ($287,500.00), and it files herewith, as part hereof, a detailed inventory of said property
33 made as of January 1, 1916, and marks same "Inventory of Physical Property" for identity. Plaintiff says that on the 3rd day of March, 1916, it furnished and delivered to the defendant, the City of Winchester, a copy of said inventory, and that the defendant, the City of Winchester, has had same and the information contained in it since said date.

Plaintiff says that notwithstanding the inventory and other information it had given defendant, the City of Winchester, no intelligent, competent or fair investigation of plaintiff's business, or its management, or of its rates, or of the cost of maintaining and operating this plant, had been made by defendant, the City of Winchester, or the city authorities of the City of Winchester, before the passing of the ordinance of June 2, 1916, and it says that if any investigation was made at all it was made of plants and rates charged in some other city, a comparison of which is not only unjust to this plaintiff but misleading, as there are no two cities with conditions sufficiently similar to warrant such comparison, the question of rates, operation and maintenance being purely and essentially a local one controlled by the factors of cost of plant, cost of operation and maintenance, taxes and the rapidity of depreciation and extension, and therefore plaintiff says that the rates fixed in the ordinance of June 2nd are arbitrary, unreasonable, unfair, unjust and confiscatory.

Plaintiff says that it has made a careful computation, by way of comparison, of the income which would have been received last year from all sources, at its rates and at the rates fixed by
34 the ordinance of June 2, 1916, and says that such calculation shows, and shows correctly, that the income of this plaintiff, had the rates fixed in the ordinance of June 2, 1916, been in force, would have been thirty-nine and one-half per cent (39½%) less than that received under its rates, making a total reduction in its receipts of, at least, thirty-nine and one-half per cent (39½%), and thus practically a confiscation of its property, and if enforced would not yield to plaintiff a just or fair or any income or return on its investments, or sufficient money to meet the necessary cost of conducting its business and maintaining its plant and appliances, and would deprive it of its property without due process of law, and its property would be taken for public use without just compensation.

Plaintiff says that although the ordinance of June 2, 1916, was directed at this plaintiff, and was intended to and does affect this plaintiff, and it alone, no notice was given to it, or any of its representatives, that the defendant, The City of Winchester, contemplated or intended to adopt any ordinance by which it would attempt or undertake to fix or regulate the charges that this plaintiff,

or any other company, should charge its customers or patrons for water furnished them, and it says that it had no notice of such intention on the part of the defendant, The City of Winchester, and that it was not given a hearing by the defendant, The City of Winchester, on the question as to what would or would not be reasonable rates or charges for water, and it was not given any opportunity by the defendant, the City of Winchester, to be heard on said
35 question, and that the action of the defendant, The City of Winchester, in passing said ordinance without giving this plaintiff a hearing or an opportunity to be heard operated to deprive this plaintiff of its property without due process of law.

Plaintiff says that under its contract with the City of Winchester, by Section 15, thereof, the city was given the right, at any time after ten years from the date of the contract, to purchase the water works, notice of intention to do so having been served upon plaintiff within six months of so doing, but plaintiff says that the defendant, the City of Winchester, has never availed itself of said opportunity, the only notice which it ever gave being one given on the 29th day of April 1916, filed herewith, which did not comply with the terms of the contract, and it says that defendant, the City of Winchester, has now no right to purchase by virtue of said contract, nor has it any authority or power to enter into any binding contract of purchase, nor has it had at any time such power or authority. This right, power or authority cannot exist until given to the Council by a two-third majority vote of the electors of the citizens cast at an election called for that purpose, which authority, right or power has never been so conferred on defendant, the City of Winchester, and plaintiff says that while defendant's, The City of Winchester, right, under the contract to purchase has expired, and defendant, the City of Winchester, cannot now compel it to sell to it its said property, yet it is still ready and willing to sell said
36 property, and the price can be agreed upon, but it says that it is informed, and hence charges, that the electors of the City of Winchester cannot vote bonds in excess of one hundred and eighty thousand dollars ($180,000.00) or give to defendant, the City of Winchester, the power or authority to issue bonds in excess of said amount, and plaintiff says that from the inventory which it furnished the City of Winchester on March 3, 1916, it can readily and easily be ascertained that the present fair and reasonable value of said property is much more than one hundred and eighty thousand dollars ($180,000.00), so that both plaintiff and defendant, the City of Winchester, know now, and knew on April 29, 1916, that it was and is impossible for the City of Winchester to purchase plaintiff's plant, but plaintiff reiterates that it is still willing to sell if said city can secure the money with which to purchase, and it is willing to enter into a contract with the City of Winchester, to furnish water to it for fire and other purposes, until said city can call an election to be held this November to secure, if possible, the power and authority to issue and sell bonds in a sufficient amount to purchase said property, or, if this cannot be done, to grant it authority to make a twenty year contract for water for fire and other

city purposes. And plaintiff says that if proper authority is granted the city for making said contract it is willing to enter into such an one, provided the city and this plaintiff can agree upon the terms, rates charges and such like, and plaintiff is willing for said contract to provide that plaintiff shall be required to extend its mains,
37 from its present reservoir, to the Kentucky River.

Plaintiff says that its two reservoirs from which it supplies water to the City of Winchester and the citizens thereof are located 4.5 miles from the City of Winchester, and it says that there is an urgent demand on the part of the citizens of Winchester that the water furnished them shall be brought from the Kentucky River, and it says that to reach the Kentucky River for water would require an extension of its mains a distance of 4.1 miles further, and that such extension and the necessary additional equipment and machinery, and the installation thereof, would require an investment and expenditure of, at least, one hundred and thirty-nine thousand, one hundred and fifty dollars ($139,150.00), but it says that it is willing to extend its mains to the Kentucky River and supply the water it furnishes from said river, and that it will do so if it is permitted to charge and collect such rates for its service as will justify and warrant it in making such additional expenditure.

Plaintiff says that it has an outstanding bonded indebtedness of one hundred and thirty-five thousand dollars ($135,000.00), which bonds were issued to raise that amount of the money that was actually used in the construction of its plant, and that in addition thereto it has an outstanding indebtedness amounting to about forty-two thousand dollars ($42,000.00) incurred in connection with the conduct and management of its business and the construction, maintenance and upkeep of its plant.

Wherefore, having amended its petition, the plaintiff prays
38 as in its original petition, and for all proper relief.

J. M. BENTON,
B. R. JOUETT,
Counsel for Plaintiff.

Affiant, Charles F. Attersall, states that he is the superintendent and principal officer of plaintiff in Kentucky, and that the statements of the foregoing amended bill are true as he believes.

CHAS. F. ATTERSALL.

Subscribed and sworn to before me by Charles F. Attersall this July 22nd, 1916.

NELL S. TUDOR,
Notary Public, Clark County, Ky.

39 *Answer.*

In the District Court of the United States for the Eastern District of Kentucky.

3064.

THE WINCHESTER WATER WORKS CO., Plaintiff,

v.

THE CITY OF WINCHESTER et al., Defendant.

The defendants, City of Winchester and D. T. Matlack, M. S. Browne, H. B. Scrivener, J. D. Sousley, T. L. Nunan, William Gilbert, C. B. George, William Jones, J. N. Renaker, and Syl Dinelli, the Mayor and Board of Council of said City, for joint answer to the bill and amended bill of the plaintiff, The Winchester Water Works Company, deny that the Exhibit "Water Contract" filed with the bill herein, is a true and correct copy of any contract made between the defendant, City of Winchester and Wheeler and Parks, or the plaintiff, or any other person or corporation; and they deny that the defendant City ever entered into any contract containing such terms or conditions as is set forth in said exhibit; and they deny that by any contract between Wheeler and Parks or the plaintiff or any other person and the defendant City, the defendant City granted any exclusive privilege of building, maintaining or operating in said City a system of water works for any purpose whatever; and they deny
40 that the defendant City granted to any person, association or corporation any perpetual privilege of laying or maintaining water pipes beneath or along the surface of the highways, streets, avenues, or public grounds, or sidewalks of said City, as the same at any time existed or might thereafter be laid out or established; and they deny that Wheeler and Parks or any of the associates or assigns of the plaintiff constructed any system of water works, reservoirs, pumping station, standpipe, water mains, hydrants or other customary equipment as provided to be done in the contract between the defendant City and Wheeler and Parks; and they deny that by any section of said contract, Wheeler and Parks, or any of their assigns or the plaintiff, were authorized or empowered to furnish water to the citizens of Winchester at rates enumerated in the schedule made a part of said alleged contract; and they deny that said section with the rates provided is truly or correctly copied or set forth in the bill herein; and they deny that there is or ever was in any contract between the defendant City and the plaintiff or any other person under whom it claims any contract, agreeing upon maximum or any rates to be charged for water served by meter; or that any of the words or figures relating to metered water and set forth in the bill herein was in any contract between the defendant City and the plaintiff or any other person under whom it claims.

Defendants deny that the plaintiff on November 30, 1904, or at

any time purchased, or is now or has been at any time since May 6th, 1916, the owner under any contract of any franchise for the use of the streets, alleys or public ways of the defendant City,
41 or any of them, or that any such right or privilege or benefit was granted by any contract to Wheeler and Parks or to any person.

The defendants deny that the defendant City of Winchester has no right, power or authority, or had none on June 2nd 1916, to pass or adopt or enforce said ordinance against the plaintiff or any other person or corporation, or to pass or adopt any ordinance which will in any wise affect or abridge the right of the plaintiff to furnish water to the citizens of Winchester at prices to be fixed by the plaintiff; and they deny that the ordinance passed on June 2nd, 1916, cannot be enforced or made to apply to the plaintiff for any reason whatever; and they deny that the plaintiff has any vested interest or property right in any street, alley or public way of the defendant City for any purpose whatever, or that it has any vested right to furnish water to any citizens of Winchester or to any one; and they deny that the rates or any rate indicated in the ordinance of June 2, 1916, is unreasonably low or confiscatory, or that the enforcement of said ordinance would deprive the plaintiff of its property, or any property, without due process of law, or would deny to it the equal or any protection of the law, or would confiscate its property, or would impair the obligation of any contract with the defendant City, or would violate the Constitution of the United States or the Constitution of the State of Kentucky; and they deny that the contract between the defendant City and Wheeler and Parks for rental of hydrants and other things expired on the 1st day of July 1916, or at any time except on May 6th 1916; and they deny that the de-
42 fendant City has no right to use said fire hydrants and water since the expiration of said contract unless a new contract can be entered into between the City and the plaintiff; and they deny that the plaintiff has any right to furnish water to the citizens of the City of Winchester at rates fixed in said contract or at any other rates which might be agreed upon between the plaintiff and the citizens of said City, or at any rate or rates other than those set forth in the ordinance of June 2nd 1916; and the defendants deny that the plaintiff has any right to make any rate or rates or charge for water greater than the charges prescribed by the ordinance of June 2nd, 1916, or that such rates will not yield a sum sufficient to pay the operating expenses, taxes and afford a reasonable return upon the value of plaintiff's property devoted to public use; and they deny that much or any of its property, except the distribution plant, in the City of Winchester is devoted to public use; and they deny that the charges set out in the pamphlet filed with the bill herein marked "Rates & Rules," was at any time duly promulgated, or that any of the rates or rules therein are just or reasonable charges for water to be furnished to the City and the inhabitants thereof or any of them; and they deny that the rates prescribed by the ordinance of June 2, 1916, are arbitrary or unreasonably low or that they will not yield a fair net return upon the property of the plaintiff devoted to

public use; and they deny that said rates are or ever were confiscatory or void; and they deny that the plaintiff has been or is ready
43 to make a new contract or that City Council has no authority to make a new contract with the plaintiff without an approving vote of the people; and they deny that the plaintiff will suffer great or any injury if the defendants be not restrained or enjoined from executing or enforcing the ordinance of June 2, 1916.

11.

The defendants for answer to the amended bill of complaint of the plaintiff, deny that the City of Winchester on June 2, 1916, did not have and has not now any authority, power or right to pass and enforce any ordinance, fixing the rates and charges which this plaintiff shall charge the Citizens of Winchester for furnishing water to them, and deny that no power has been granted or delegated to the defendant, the City of Winchester, by the Legislature of Kentucky to fix rates which the plaintiff may charge the private consumer; and defendants deny that the rates or charges fixed by the ordinance of June 2, 1916, or any rates or charges which may be fixed by any ordinance at any time at any price less than those now being charged the citizens of Winchester, would be confiscatory, or would be taking the property of the plaintiff without due process of law, or would be denying to it the equal protection of the law, or would in effect be taking its property for public use without just compensation being made.

Defendants deny that the rates or charges or rules or regulations, or any of them, which the plaintiff has been charging the
44 citizens of Winchester since November 1907, or for any part of said time, for water service, are just or reasonable; defendants say that they have no knowledge or information sufficient to form a belief, and therefore, deny that during all of that time or any part thereof, the plaintiff has conducted its affairs, or any of its affairs, or business prudently, or skilfully or economically, or that from such alleged prudent, careful or economical conduct of its business under said rates or charges, rules or regulations, it has been unable to produce during said time sufficient revenue after the payment of expenses and upkeep, to pay, or that it has not paid any dividend or dividends to its stockholders upon its capital of One Hundred Thousand Dollars ($100,000.00).

Defendants say that they have no knowledge or information sufficient to form a belief, and therefore deny, that the total revenue derived from rentals from its patrons including the City of Winchester, for the past five years is as follows:

1911	$21,652.26
1912	22,481.93
1913	26,277.18
1914	26,966.94
1915	25,146.52

or any other sums for rentals for each of said years, except a sum largely in excess of the amounts aforesaid, or an average for each

of said years of $24,504.97; or any other average for each of said years except a sum largely in excess of the sum aforesaid.

Defendants say that they have no knowledge or information sufficient to form a belief and therefore deny, that the plaintiff's disbursements for the years 1911, 1912, 1913, 1914 and 1915, or any of them, in expenses, operation or upkeep, exclusive of depreciation and renewal reserve fund and municipal taxes, paid by service, have been as follows:

1911	$13,221.81
1912	14,252.17
1913	16,207.77
1914	17,318.94
1915	15,600.54.

or that its disbursements for said years in expenses, operation and upkeep, have been for any of said years, in excess of Five Thousand Dollars ($5,000); or an average for said years of $15,320.25, or any sum in excess of Five Thousand Dollars ($5,000) or that in addition to said expenditures for operating expenses and charges, the plaintiff paid in interest on bonds, notes or accounts, or any of them, constituting its outstanding indebtedness, the following sums:

In 1911	$7,288.37
1912	7,288.76
1913	7,725.03
1914	8,216.59
1915	8,364.84

or an average of $7,776.72; or that it applied to a depreciation or renewal reserve fund, the following sums:

In 1911	3,000.00
1912	2,500.00
1913	3,000.00
1914	3,250.00
1915	3,000.00

or any sum except a sum largely in excess thereof.

Defendants deny that all of the disbursements set out in the plaintiff's amended bill of complaint, or any of them, were reasonably necessary, or that the alleged amounts, or any of them, expended, were fair or reasonable charges for such service or expenses in the conduct of its business, except the sum of Five Thousand Dollars ($5,000.00) annually for expenses, operation and upkeep as hereinabove set out.

Defendants deny that the present fair and reasonable value of its property which is used, or is reasonably necessary to be used, in supplying water to the City of Winchester and the citizens thereof, is not less than the sum of Two Hundred and Eighty-seven Thousand, Five Hundred Dollars ($287,500.00), or any sum in excess of the

value of Forty Thousand Dollars ($40,000.00), and defendants deny that all of the plaintiff's property is used, or is reasonably necessary to be used in so supplying water to the City of Winchester and the citizens thereof, or that any part of its property is so used except the pumping station, lower reservoir, pipes and appliances and distributing system; and deny that the detailed inventory of the property of the plaintiff, alleged to be made as of January 1, 1916, and filed with said amended bill, marked "Inventory of Physical Property", is a correct or true inventory of said property, or that any of the items of said property are reasonably worth the amount set out in said inventory, or that the whole of the property set out in said inventory is reasonably worth more than the sum of Forty Thousand Dollars ($40,000.00).

Defendants deny that no intelligent, competent or fair investigation of plaintiff's business and its management and rates, and of the cost of maintaining and operating its said plant, has been made by the defendant, The City of Winchester or the City authorities of the City of Winchester, before the passing of the ordinance of June 2nd, 1916, and says that it made an intelligent, fair and
47 thorough investigation of all of said matters, and deny that the rates fixed in the ordinance of June 2, 1916, are arbitrary, or unreasonable, or unfair or unjust or confiscatory; and deny that the rates fixed in the ordinance of June 2nd, 1916, would, had they been enforced during the past year, have reduced the receipts of the plaintiff to the extent of thirty-nine and one half per cent (39½%), or any per cent more than fifteen per cent, or that thereby its property would be practically confiscated or confiscated at all, and deny that said rates fixed by said ordinance of June 2, 1916, would not yield to the plaintiff a just and fair income or return on its investment, or sufficient money to meet the necessary costs of conducting its business and maintaining its plant and appliances, or would deprive it of its property without due process of law, or that its property would thereby be taken for public use or any use without just compensation.

Defendants deny that the plaintiff had no notice of the ordinance of June 2nd, 1916, or of the intention or purpose of the City Council to pass said ordinance before it was passed; and they deny that the plaintiff was not given a full opportunity to be heard on the question as to the reasonableness of the rates to be charged for water furnished before said ordinance was enacted, or that any action of the City of Winchester in passing said ordinance operated to deprive the plaintiff of its property or any of it without due process of law.

Defendants deny that by the notice given on April 19th 1916, it did not comply with the terms of the contract between the defendant City and the plaintiff and those under whom they claim; and
48 they deny that the defendant City has no right to purchase the water plant, or that it has no authority nor power to enter into any binding contract to purchase same; and they deny that the right, power or authority does not exist in the City Council to purchase said plant until a two-thirds majority vote of the electors of the defendant City has authorized the purchase of said plant; and they deny that the City of Winchester has no right under the contract to purchase said plant, or that its right has expired, or that the defend-

ant City cannot now compel the plaintiff to sell to it its said property in accordance with the terms of said contract; and they deny that the plaintiff is ready or willing to sell said property for its reasonable value as provided in said contract or at all; and they deny that the electors of the City of Winchester cannot vote bonds in excess of One Hundred and Eighty Thousand Dollars ($180,000.00), or in any sum less than Two Hundred and Twenty-five Thousand Dollars ($225,000.00); and they deny that the plaintiff or defendants or any one knew on April 29th 1916, or at any other time, that it was impossible for the City of Winchester to purchase the plaintiff's plant; and they deny that from the inventory furnished the defendant City on March 3, 1916, it can be ascertained at all that the present fair or reasonable value of said property is more than, or as much as, One Hundred and Eighty Thousand Dollars ($180,000.00); and they deny that the extension of the water mains to the Kentucky River, and the necessary initial equipment and machinery and the installation thereof, would require an expenditure of One Hundred and Thirty nine Thousand, One Hundred and Fifty Dollars ($139,150.00), or any sum in excess of Sixty Thou-
49 sand Dollars ($60,000.00); and they deny that the plaintiff is or ever has been willing to extend its mains to the Kentucky River, or supply water from said River for a reasonable or just charge for water so supplied; and they deny that the plaintiff has a bonded indebtedness of One Hundred and Thirty-five Thousand Dollars ($135,000.00) or any other sum, or that said alleged bonds or any of them were issued to raise that amount of money, or any sum of money, that was actually used in the construction of its plant; or that in addition thereto it has an outstanding indebtedness amounting to Forty-two Thousand Dollars ($42,000.00), or any other sum, or that said alleged indebtedness or any part thereof, was incurred in the conduct or management of its business, or in the construction, maintenance or upkeep of its plant; and they deny that the plaintiff has made any careful or correct computation of the income which would have been received last year from all sources or any source, at the rates fixed by the ordinance of June 2, 1916, or that any correct calculation shows, or shows correctly, or at all, that the income from the plaintiff's plant under the rates fixed by the ordinance of June 2, 1916, has been reduced thirty-nine and one-half (39½%) per cent, or any per cent more than fifteen per cent.

III.

Defendants for further answer to plaintiff's bill of complaint and amended bill of complaint herein, say that on the 19th day of September 1890, the City of Winchester, acting by and through its Mayor and Board of Council, entered into a contract with
50 William Wheeler and Charles F. Parks, a co-partnership, doing business under the firm name of Wheeler & Parks in Boston in the State of Massachusetts, their associates, successors and assigns, a certified copy of which contract is filed herewith as part hereof, marked "Exhibit A"; they say that said contract provides for the building, maintaining and operating a system of water-works for the purpose of supplying the citizens of the said City of Win-

chester with water suitable for fire, all domestic, mechanical and other purposes, and that said contract is the only contract which was ever made between the said City of Winchester and the said Wheeler and Parks, or between said City and any other person or persons or corporation for the supplying of water to the City of Winchester and its citizens; they say that after the execution of said contract it was assigned by the said Wheeler & Parks to a company organized by the said Wheeler and his associates, which was known as the Winchester Water Company; that in the year immediately following the 19th day of September 1890, the said Winchester Water Company as the successor of Wheeler & Parks located the site of its water plant and reservoir about four and one-half miles from the City of Winchester, and constructed a dam across a branch for the purpose of making its reservoir and collecting water from said branch and surface drainage to supply water under said contract to the City of Winchester and its citizens; that by the terms of said contract, the Winchester Water Company as successor to the said Wheeler & Parks, covenanted and agreed to furnish an adequate supply of surface water from some desirable source, and said supply to be ample
51 for a population of ten thousand people, and to be increased whenever the growth of the City shall demand.

Defendants say that in June 1891, the Winchester Water Company began the operation of its water works plant, and continued to furnish water to the City of Winchester and its other patrons until the Summer of 1903; that for several years prior to the summer of 1903, the Winchester Water Company allowed its reservoir to become filled up with mud, mire and debris, so that the supply of water was wholly inadequate to the needs of the City of Winchester and its citizens, and in the summer of 1903, the supply of water wholly failed and the reservoir became dry, and that in suffering and permitting said reservoir to fill up with mud, mire and debris, and in allowing the said reservoir to become dry, the Winchester Water Company breached its contract to furnish an adequate supply of water.

Defendants further say that the Winchester Water Company as successor to the said Wheeler & Parks, covenanted and agreed by said contract to supply the citizens of the said City of Winchester with water suitable for fire, all domestic, mechanical and other purposes; that said Company failed and refused to carry out its said contract for the years 1899, 1900, 1901, 1902 and 1903, to furnish suitable water for said purposes, in that said company allowed its reservoir to fill up with mud, mire and debris and decaying vegetable and animal matter, whereby the water was made wholly unsuitable for all domestic purposes.

Defendants further say that the Winchester Water Com-
52 pany failed for some years prior to 1904, to pay the interest on its indebtedness, and in said year the American Loan & Trust Company as Trustee of the bonds issued upon the property of the Winchester Water Company secured by deed of trust, instituted suit in the Circuit Court of the United States for the Eastern District of Kentucky against the Winchester Water Company, and recovered judgment and a decree foreclosing the mortgage upon said property, and on the 14th day of May 1904, the Special Commissioner, Lucien

Beckner, exposed said property at public auction to the highest and best bidder, in pursuance to said decree, and at said sale the aforesaid William Wheeler became the purchaser of all of the properties of the Winchester Water Company at a price of Ten Thousand Dollars ($10,000.00), which sale was on May 17, 1904, approved and confirmed by said Court, and thereafter said Special Commissioner on the 6th day of June 1904, executed a deed of conveyance to the said William Wheeler conveying to him for the sum of Ten Thousand ($10,000.00) Dollars all of the properties of the Winchester Water Company, consisting of all franchises, easements, buildings, structures, reservoirs, machinery, water pipes, tools, hydrants, equipments, contracts, and all of its real estate, and all other properties, real, personal and mixed, including all privileges, rights, benefits, immunities and exemptions.

Defendants say that on the 6th day of June, 1904, the said William Wheeler, conveyed all of the aforesaid property to the Winchester Water Works by deed of said date, and of record in the Clark County Clerk's Office in Deed Book 73, page 131; that said Winchester Water Works was a corporation organized by the said William Wheeler; and that the said William Wheeler executed said deed in consideration of the issue of five hundred shares of stock
53 of the par value of One Hundred Dollars ($100.00) each of the said Winchester Water Works, which amount of stock represented the capital stock of the Winchester Water Works, and that at the direction of said Wheeler, and for the purpose of preserving the rights of a corporation to the Winchester Water Works, four hundred and ninety-four shares of said stock were issued to the said Wheeler, three shares to Charles F. Attersall, who was the Superintendent of the water works plant of said Company, and three shares to E. S. Jouett, who was the attorney for said Company.

Defendants say that on November 30th, 1904, the Winchester Water Works conveyed to the plaintiff, Winchester Water Works Company, all of its property by deed which is of record in the Clark County Clerk's Office in Deed Book 73, page 448, and that in consideration of said conveyance, the stockholders of the Winchester Water Works Company, namely, William Wheeler, Charles F. Attersall and E. S. Jouett, received all of the capital stock of the Winchester Water Works Company.

Defendants say that since the 30th day of November, 1904, the Winchester Water Works Company has owned, controlled and operated said Winchester water plant; that after the plaintiff company became the owner of said plant, it purchased a considerable tract of land near its first reservoir and lying above same and along a fork of the branch across which said first dam was built, and thereafter constructed a dam above said first dam and across said fork of the branch for the purpose of increasing its storage capacity; that said second dam is a much larger and more expensive dam than the first one built by the old water company, but the same has
54 proved worthless and of no value whatever as a reservoir, on account of the leaks and rapid seepage of water, and affords practically no supply of water in a dry season, and that the money

expended by the plaintiff company in purchasing the additional land and building said dam, and the large amount of money spent in efforts to make it hold water have been wasted and are of no value, and that the investment of money by the plaintiff company in said second reservoir has not increased at all the assets of the plaintiff company, except as to the intrinsic value of the land purchased, which is valuable only as farming land; that the money expended on said second reservoir and wasted as above set out, constitutes by far the larger part of the money expended by the plaintiff company on its water plant; that the only other work done by the plaintiff company to increase its storage capacity, was the building of an addition to the first dam, whereby it was raised a few feet, but that said first reservoir had become so filled with mud, mire, filth and debris, that the raising of said dam did not in fact increase its original storage capacity; that during the past twenty-five years said reservoir has not been cleaned, but has been allowed to accumulate with mud, mire, filth, ordure and offal thereby the water is now and has been for a number of years rendered unsuitable for any of the purposes in said contract, and especially for domestic purposes, and the same has become dangerous and a menace to the public health; that by reason of the accumulation of mud, mire, filth, ordure and offal, and the growth and dying of vegetable matter, and the dying and decomposition of animal matter, the water is and has been for a
55 large portion of each year for a number of years last past, rendered unwholesome, highly distasteful and of foul odor.

Defendants say that the only improvements of any consequence attempted to be made by the plaintiff company in its water plant is the installation of a so-called filtration plant, the appliances for which were cast off and thrown away as obsolete, worn out and useless by the Knoxville Water Company, which Company was largely owned and controlled by the aforesaid William Wheeler; that said filtration plant is wholly inadequate, impractical and obsolete in the use of the filtration of water; that it is incapable of being cleaned and kept clean; that it does not take out of the water its impurities, but rather collects the impurities, and allows putrefaction and decomposition of animal and vegetable matter to take place, and to be thrown into the water supplied for the City of Winchester, and is a prolific breeding place for disease germs, which are hurtful, dangerous and deadly to human and animal life; that the machinery, pumps, water mains, pipes and standpipe of the plaintiff company have been in use by it and those under whom it claims, for the past twenty-five years; that all of the same have become worn-out, dilapidated, deteriorated in value, and wholly inadequate for the purposes for which same are used, and that the same has no actual market or salable value; that said company does now and has at all times allowed its standpipe to remain open and uncovered, so that the water supplied to it, although filtered imperfectly before reaching said standpipe, becomes further polluted and impure by reason of foreign matter being
56 allowed to fall and remain in said standpipe; that said standpipe is now and has been for many years unsanitary and obsolete in its design and pattern and inadequate in size, and without

proper means for cleaning, and wholly insufficient to furnish sufficient water pressure for fire protection.

Defendants say that if it should be held by the Court that the plaintiff company has a perpetual franchise to furnish water to the citizens of Winchester, Kentucky, not only will the City of Winchester and its citizens be deprived of the right and power of supplying said City and its inhabitants with pure, suitable and wholesome water, and an adequate supply thereof, but all private consumers of said City will be required to pay exorbitant and extortionate rates for water unfit for domestic purposes, and dangerous and hurtful to human health and life; that the City of Winchester has a population of about nine thousand people, and that if it should be held by the Court that the plaintiff company has a perpetual right to furnish water for domestic purposes to the citizens of Winchester at the rates heretofore and now claimed, then by reason of such franchise the Winchester Water Works Company is now and will be for generations to come a monopoly, and necessarily so for the reason that the City of Winchester and its citizens cannot support two water companies; that the City of Winchester as a municipality cannot own and operate a water plant in the City of Winchester, except that it has the privilege and right to furnish water to its inhabitants for domestic and all other purposes.

57 Defendants say that by reason of the dilapidated, worn-out and obsolete condition of its machinery, apparatus and appliances, that its plant and all of its properties, available or useful in a water works system for the City of Winchester are not worth more than the sum of Forty Thousand Dollars ($40,000).

Wherefore, these defendants having fully answered, confessed, traversed and avoided or denied all the matters in the said bill of complaint and amended bill of complaint material to be answered according to their best knowledge and belief, humbly pray this Honorable Court to enter its judgment that these defendants be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained, and for such further and other relief in the premises as to this Honorable Court may seem meet and in accordance with equity.

H. H. MOORE,
City Attorney.
J. SMITH HAYS,
J. F. WINN,
J. M. STEVENSON,
F. H. HAGGARD,
Attorneys for Defendants.

Defendants, D. T. Matlack, Mayor, and M. S. Brown, Council, say that the statements contained in the foregoing answer are true as they believe.

D. T. MATLACK,
Mayor.
M. S. BROWNE,
Chrm. Spec. Com.

Subscribed and sworn to before me by D. T. Matlack and
58 M. S. Browne this 31st day of July, 1916.

KATHERINE NUNAN,
Examiner Clark Co., Kentucky.

59 *Motion.*

Filed August 10, 1916.

Now, comes the plaintiff and moves the court to dismiss the answer filed herein and to submit this cause upon the pleadings and exhibits filed as to the question there presented, of whether the City of Winchester has any authority, or is authorized, to fix or regulate rates by ordinance or otherwise, which the complainant herein can charge for furnishing water to the city and its citizens, and the defendants agree for the submission of this case upon said motion and question, the finding thereon to be a final and appealable order; and this cause is accordingly submitted as of August 10th, 1916.

This September 13, 1917.

J. M. BENTON,
B. R. JOUETT,
Attorney- for Plaintiff.
HAYS & HAYS,
J. M. STEVENSON,
Attorneys for Defendants.

60 *Opinion.*

Filed February 23, 1917.

THE WINCHESTER WATER WORKS COMPANY, Plaintiff,

vs.

THE CITY OF WINCHESTER et al., Defendant.

Opinion.

There is no motion in this case pending before me, nor is it there for final decree. It is merely before me on a question in it. The plaintiff bases its right to the relief which it seeks on two grounds. One is that the defendant City had no power to enact the ordinance complained of; and the other that it is confiscatory. It thinks that, if it is decided that it is right as to the first position, there will be no necessity to undergo the labor and incur the expense required to prepare the case on the other question. Hence it seeks a decision of the first one, which is a question of law arising on the pleadings. The defendants do not object to this and though it is irregular for a court to determine a question in a case apart from some motion in it or final hearing thereof and I am not advised just how plaintiff

thinks the case should be disposed of in event the decision is favorable to it, the question having been briefed by both sides, I will proceed to decide it as I think it should be and give my reasons for my decision.

The right to regulate the rates of a public service corporation is, as has been said by Mr. Justice McKenna in the case of

61 Owensboro vs. Owensboro Waterworks Co., 191 U. S., 358,

"a common governmental power." It resides in the first instance in the legislature and may be delegated by it to the municipality in which the corporation does business. But in the absence of such delegation the municipality cannot exercise it. The law, as to what powers, generally speaking, a municipality may exercise is thus stated in

Dillon on Municipal Corporations (5th Edit.), Vol. 1, Sec. 89:

"The rule of law is that a municipal corporation can exercise only such powers as are granted to it in express terms, or those necessarily or fairly implied in or incident to the powers expressly granted, or those that are essential and indispensable, not simply convenient, to the declared objects and purposes of the corporation. And fair, reasonable doubt concerning the existence of the power is resolved by the courts against the corporation, and all acts beyond the scope of the powers granted are void."

And the law as to what is essential in order that a municipality may have the power to regulate the rates of a public service corporation within its limits is thus stated in the same work Vol. 3, Sec. 1325:

"Independently of a right to regulate and control the rates to be charged for public service reserved in a grant of a franchise or right to use the city streets, a city or other municipality has no power to regulate the rates to be charged by water, lighting or other public service corporations in the absence of express or plain legislative authority to do so."

That there should be plain legislative authority and, if there is a reasonable doubt as to its existence, it should be taken that there is no authority is accentuated by the consideration that in such a case there is a touch of unfairness in the fact of the party served having power to determine the rate at which the service should be rendered.

62 No right to regulate and control plaintiff's rates was reserved in the grant of its franchises and right to use the streets of the defendant city. In order then for it to have had the right to pass the ordinance complained of there must have been express or plain legislative authority for it to do so and if there is a fair reasonable doubt as to the existence of such authority it is to be resolved against defendants.

The defendant city is a city of the 4th class and the particular provisions in the charter of such cities upon which defendants rely are subdivision 25 and the first sentence of sub section 33 of Section

3490, entitled "General Powers of Council" and containing 34 subdivisions, of Kentucky statutes.

Subdivision 25 is in these words:

"The Board of Council may grant the right of way over the public streets or public grounds of the city to any railroad company or street railroad company, on such conditions as to them may seem proper and shall have a supervising control over the use of same, and shall regulate the speed of cars and signals and fare on street cars; and under like condition and supervision may grant the right of way that may be necessary to gas companies, water companies, electric light companies, telephone companies, or any like companies; and may compel any railroad company to erect and maintain gates at any railroad crossing and to prevent railways from blocking or obstructing the streets or public ways of the city and to fix penalties for the violation of these provisions."

The first sentence of subdivision 33 is in these words:

"Said city council shall have legislative power to make by-laws and ordinances for the carrying into effect of all of the powers herein granted for the government of the city and to do all things properly belonging to the police of incorporated cities."

63 The defendant would emphasize the words:

"and to do all things properly belonging to the police of incorporated cities."

But it is clear that this provision is not a source of the power in question. The Court of Appeals of Kentucky has held that a similar provision in the charter of cities of the fifth class confers no such power.

United Fuel & Gas Co. v. Commonwealth, 159 Ky., 34.

The power- of the city council of such cities are set forth in Section 3637 Kentucky Statutes, consisting of ten subdivisions. Subdivision 7 is in these words:

"To do and perform any and all acts and things necessary to carry out the provisions of this chapter and to exact and enforce within the limits of such city all other local police, sanitary and other regulations as do not conflict with general laws."

The word "exact" here should be "enact." Judge Hobson in that case thus refers to this subdivision:

"Among other things in the seventh subdivision the council is given authority to enact and enforce within the limits of the city all other local police, sanitary and other regulations not conflicting with general laws."

This decision is controlling on this court. But if such decision were not in existence it would still have to be held that the provision does not confer the power in question. For it is well settled by the numerous decisions cited on behalf of plaintiff that such and similar

general language does not grant to a municipality power to regulate the rates of public service corporations therein. Those decisions are as follows, to-wit:

64 St. Louis v. Bell Telephone Co., 96 Mo., 623.
Lewisville N. Gas Co. vs. State of Indiana, 135 Ind., 49.
Re Pryor, 55 Kans., 724.
Mills vs. Chicago, 127 Fed., 731.
Jacksonville v. Southern Bell Telephone Co., 57 Fla., 374.
State v. Telephone Company, 188 Mo., 83.
State vs. Sheboygan, 111 Wis., 23.
Bluefield W. & I. Co. v. Bluefield, 69 W. Va., 1.
Cumberland T. & T. Co. v. Memphis, 200 Fed., 657.

The last decision comes from the Appellate Court of this Circuit.

In connection with the decision of the Kentucky Court of Appeals in the United Fuel & Gas Company case it should be noted that it quotes and relies on Section 1325 of Vol. 3 of Dillon on Municipal Corporations, quoted above, and the decision of the Supreme Court of Missouri in the St. Louis case and that of the Supreme Court of West Virginia in the Bluefield case.

This brings us to subdivision 25. It will be noted that it consists of three clauses, to-wit: one relating to railroad companies and street railroad companies, one to gas companies, water companies, electric light companies, telephone companies and like companies, and one to railroad companies. No further reference need be made to the third or last clause, though it may be of some significance as witnessing to the specific character of the subdivision. Before considering the second clause it is important to take in the first one. It consists of three provisions. The first one relates to the original grant to the companies covered by it, i. e., railroad companies and street railroad companies. It is that the city council may

65 grant to such companies "the right of way over the public streets or public grounds of the city * * * on such conditions as to them may seem proper." The other two relate to the control which may be exercised over such companies after they have entered under the grant. By the first of the two it is provided that the city council "shall have a supervising control over the use" of the public streets and public grounds of the city. By the other one it is provided that such body "shall regulate the speed of cars and signals and fare on street cars." This in fact consists of two parts, the first of which, as to regulating the speed of cars and signals, related to both companies, and the other of which, as to regulating the fare on street cars, relates solely to street railroad companies. The provision as to regulating rates relating solely to street railroad companies negatives the idea, if it were possible otherwise to have such an idea, that power to regulate fares of railroad companies was conferred. As to the first of the last two provisions of the first clause it will be noted that the supervising control thereby conferred is "over the use of the same," i. e., of the public streets and public grounds of the city over which the right of way is granted. It is, therefore, not broad enough to cover what is conferred by the second of those two

provisions. And if its words are broad enough to cover what is so conferred, within the intent of the legislature, it was not covered thereby. This is shown by the fact that it is conferred by a specific
66 provision to that effect. It providing specifically that the city council should have the power to regulate the speed and signals of railroad companies and street railroad companies and the fare of street railroad companies, the legislature manifested that, in its thought, the provision conferring on the city council the supervising control over the use of the public streets and public grounds by railroad companies and street railroad companies over which they have been granted, the right of way, does not confer on such body such power.

This analysis of the first clause of this subdivision prepares us for a consideration of the second clause. It is somewhat awkward. It provides that the city council may grant the right of way that may be necessary to gas companies, water companies, electric light companies, telephone companies and like companies "under like condition and supervision." In the first provision of the first clause the plural word "conditions" and the preposition "on" are used. By mistake, just as in the seventh subdivision of 2627, in the charter of cities of the fifth class the word "exact" was used for the word "enact," so here the singular "condition" is used for the plural "conditions" and the preposition "under" is used for "on" as governing the word "conditions." That was the proper preposition to govern the word "supervision" and as one proposition was desired to govern both "under" was used. To have been accurate the phrase
67 should have been "on like conditions and under like supervision." One's direct vision of reality is sufficient without more to justify this position. So treating this phrase, the second clause is as if it provided that the city council may grant the right of way to such companies" on such conditions as to them may seem proper" and "shall have supervision control over the use" of the right of way so granted, the same as in the case of railroad companies and street railroad companies. And, as we have seen, the provision conferring supervising control as to the latter companies does not confer power to regulate the rates thereof so, as to the former companies, it does not confer power to regulate rates thereof. It tends to support the position that thereby no power to regulate the rates of such companies was conferred, that amongst such companies are companies which are not entirely local, as for instance telephone and telegraph companies. In the Memphis case, Judge Denison said:

"A city telephone exchange is not strictly local; this company is part of an interstate system; other communities are interested in the service. There are ample reasons why the state legislature might wish to reserve this power to itself and there is no reason why it is essential to the city."

We have seen that, as to railroad companies which are not local, the intent is clearly manifested by the first clause not to confer any power to regulate their rates. And whilst telephone companies do in part transact a strictly local business, telegraph companies are like

railroad companies in this respect and do not transact such
68 business at all. The power conferred by the second clause is exactly the same as to all the companies covered by it and, as it certainly could not have been intended to confer thereby power to regulate the rates of telegraph companies it was not intended to confer such power as to any of the other companies covered thereby.

Another consideration supporting such position is that by subdivision 8 of Section 3490 the city council of cities of the 4th class are empowered

"To provide the city with water or erect, purchase or lease water works and maintain same, or to make all necessary contracts with any person or corporation for such purposes; to erect hydrants, cisterns, fire plugs and pumps in the streets within or beyond the limits of the city."

This is substantially the same provision as that contained in the 5th subdivision of Section 3290 relating to powers of the city council of cities of the third class construed by the Supreme Court in the Owensboro case except that this subdivision is broader in that it covers light, power, heat and telephone service as well as water service and as the Supreme Court construed it, conferred power to fix rates of public service corporations rendering such service. It is not without some significance that in subdivision 8 of 3490 there was no provision as in subdivision 5 of Section 3290 conferring expressly power to the city council to fix the rates of water service. Judge Hobson in the United Fuel & Gas Company case took the position that no power to fix rates was conferred on the city council of the larger cities, including cities of the third class, to fix rates of public service corporations, and argues therefrom that there was no
69 intention to confer such power as to cities of the fifth class. He said:

"The act for the government of cities of the fifth class must be read in connection with acts for the government of other classes of cities. No such broad powers are conferred on larger cities, and the minute statement of what the city may do was unnecessary if this subdivision was intended to give it all the power not conflicting with general laws."

It would seem from this that he differed from the Supreme Court as to the true construction of subdivision 5 of Section 3290 as to cities of the third class. Possibly, however, his attention was not directed closely to that provision and the construction which the Supreme Court had placed upon it, or his statement would not have been so broad. But if the position of the Supreme Court is the true view of the matter the point still remains that as to cities of the third class in the provision conferring power to provide water service by municipal water works or contract with a water company power was also conferred to fix the rates thereof whereas as to cities of the fourth class in such provision no such power is conferred.

This statement of Judge Hobson affords slight support to the position that cities of the fourth class possess no such power save as to

street car companies and in the concluding argument thereof justification is found for the position heretofore taken that it is a true inference from the third provision of the first clause of subdivision 25 of Section 3490 that the second provision thereof, by which supervising control thereof was conferred, does not include anything covered by the third provision.

70 The defendants cite nothing against this position of the plaintiff except 40 Cyc. 796 and the authorities cited in support of the text. There is, however, nothing in either the text or authorities cited against plaintiff's position. On the contrary the authorities cited in support of the first clause of the first sentence of the text, to-wit:

"The legislature has power, which it may delegate to a municipality, to fix the rates to be charged by a water company for its services."

are inferentially against it. The legislation involved in those cases show how, when a legislature desires to confer authority on a municipality to fix rates, clearly and plainly it expresses itself to this effect. To the same effect are the decisions in the cases of

Wyandotte Gas Co. v. Kansas, 231 U. S., 622
Des Moines Gas Co. v. Des Moines, 238 U. S. 152

involving legislation of the states of Kansas and Iowa conferring on the municipalities of those states power to fix gas rates.

A careful consideration of the question before me, therefore, has driven me to the conclusion that the defendant city had no power to enact the ordinance complained of and that it is null and void, and I cannot do otherwise than so hold.

A. M. J. COCHRAN,
Judge.

Febry 22, 1917.

71 *Supersedeas Bond.*

Filed September 24th, 1917.

Know all men by these presents: that we, City of Winchester, Kentucky, D. T. Matlack, M. S. Browne, H. B. Scrivener, J. D. Sousley, J. W. Wheeler, William Gilbert, C. B. George, J. D. Jones, J. N. Renaker, N. Roll Ratliff, principals, and D. T. Matlack, sureties, all of the City of Winchester, Clark County, Kentucky, are held and firmly bound unto the above named, The Winchester Water Works Company in the sum of One Thousand Dollars ($1,000.00) to be paid to the Winchester Water Works Company, for the payment of which well and truly to be made, we bind ourselves and each of us, and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 17th day of September 1917 A. D.

Whereas, the above named City of Winchester, and others, have

prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above entitled suit by the Judge of the District Court of The United States for the Eastern District of Kentucky

Now therefore, the conditions of this obligation are such, that if the above named City of Winchester, Kentucky, and others shall prosecute said appeal to effect and answer all damages and costs, if they fail to make said appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and effect.

THE CITY OF WINCHESTER, KY.
Per D. T. MATLACK, *Mayor.*
D. T. MATLACK.

O. K.
B. R. JOUETT.

Approved: Sept. 21, 1917.
A. M. J. COCHRAN,
Judge.

72 *Citation.*

Issued Sept. 22, 1917.

United States District Court, Eastern District of Kentucky.

THE UNITED STATES OF AMERICA.
Eastern District of Kentucky, ss:

To Winchester Water Works Company, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Supreme Court to be holden at the City of Washington on the 22nd day of October next, pursuant to an appeal filed in the Clerk's Office of the District Court of the United States for the Eastern District of Kentucky, wherein the City of Winchester, D. T. Matlack, M. S. Browne, H. B. Scrivener, J. D. Sousley, J. W. Wheeler, Wm. Gilbert, C. B. George, J. D. Jones, J. N. Renaker, and N. R. Ratliff are appellants and Winchester Water Works Company is appellee to show cause, if any there be, why the judgment rendered against the said appellant, as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness my hand, as Judge of the said District Court, and the seal of said Court at Covington, this 22nd day of September in the year of our Lord one thousand nine hundred and seventeen and of our Independence the 142nd Year

[SEAL.] A. M. J. COCHRAN,
Judge of the U. S. District Court, Eastern District of Kentucky.

I hereby accept service of the within citation this 22nd day of September 1917.

BEVERLY R. JOUETT.

73 *Præcipe.*

Filed September 14, 1917.

To the Clerk of the District Court at Covington, Kentucky:

You are directed to prepare a transcript of the record, proceedings and papers in the above styled cause, lately pending in your Court and duly certify the same under your seal to the Supreme Court of the United States; and you will include in said transcript the following:

1. A complete transcript of the orders in the case.
2. The Bill in Equity.
3. The Amended Bill of Complaint.
4. The Answer.
5. Motion of the plaintiff dated August 10, 1916.
6. Opinion of the court filed February 23, 1917.
7. Appeal and order allowing appeal.
8. Supersedeas bond.
9. Citation on appeal.
10. This præcipe.
11. Clerk's certificate and seal.

J. M. STEVENSON,
HAYS & HAYS,
Attorneys for Appellant.

We acknowledge receipt of a copy of this præcipe this — day of September, 1917.

JAMES M. BENTON,
BEVERLY R. JOUETT,
Attorneys for Respondent.

74 THE UNITED STATES OF AMERICA,
Eastern District of Kentucky:

I, J. W. Menzies, Clerk of the United States District Court for the Eastern District of Kentucky, at Covington, do hereby certify that the foregoing 73 pages contain a true and correct copy of the record herein, as called for by the præcipe filed herein, as the same appears from the records and files of this office.

Witness my hand as clerk and seal of said court at Covington, Kentucky, this 17" day of October, A. D. 1917 and of our Independence the 142" year.

[Seal U. S. District Court, East. Dist. of Ky., U. S. of America.]

J. W. MENZIES,
Clerk.

75

Citation.

United States District Court, Eastern District of Kentucky.

3,064.

THE UNITED STATES OF AMERICA,
Eastern District of Kentucky, ss:

To Winchester Water Works Company, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Supreme Court, to be holden at the city of Washington, on the 22 day of October next, pursuant to an appeal filed in the Clerk's office of the District Court of the United States for the Eastern District of Kentucky, wherein City of Winchester, D. T. Matlack, M. S. Browne, H. B. Scrivener, J. D. Sousley, J. W. Wheeler, Wm. Gilbert, C. B. George, J. D. Jones, J. N. Rennaker and N. R. Ratliff are appellants, and Winchester Water Works Company is appellee, to show cause, if any there be, why the judgment rendered against the said appellant, as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness my hand, as Judge of the said District Court, and the seal of said Court, at Covington this 22 day of September in the year of our Lord one thousand nine hundred and seventeen and of our Independence the 142nd year.

A. M. J. COCHRAN,
Judge of the U. S. District Court,
Eastern District of Kentucky.

I hereby accept service of the within citation this 22 day of Sept., 1917.

BEVERLY R. JOUETT.

Filed Sep. 24, 1917. J. W. Menzies, U. S. Clerk.

Endorsed on cover: File No. 26,228. E. Kentucky D. C. U. S. Term No. 761. City of Winchester et al., appellants, vs. Winchester Water Works Company. Filed November 15th, 1917. File No. 26,228.

IN THE

Supreme Court of United States

OCTOBER TERM, 1919.

CITY OF WINCHESTER ET AL., *Appellants,*

v.

WINCHESTER WATER WORKS COMPANY, *Appellee.*

No.....

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY, COVINGTON DIVISION.

BRIEF FOR APPELLANTS.

POINTS AND AUTHORITIES.

1. The question here for consideration is: Has the city of Winchester power under its charter as a city of the fourth class in Kentucky to fix and regulate charges for water furnished to the city and its inhabitants by a public service water company?

2. The city is clothed with authority to fix rates by the language of Kentucky Statutes, Subsection 25, and the other sub-sections show that it was the plain legislative intent to bestow such power.

Cited:

Kentucky Statutes, Section 3490, Sub-sections 8, 25, 30, 33;

Owensboro v. Owensboro Water Co., 191 U. S. 358 (48 Law Edition 217);

Kentucky Statutes, Section 3290, Sub-section 5.

37 Cyc 604

3. The language of the Court of Appeals of Kentucky cited by the district court relative to charters of cities of the third and fourth class in Kentucky is *dictum*.

Cited:

United Fuel & Gas Co. v. Commonwealth, 159 Ky. 34.

BRIEF FOR APPELLANTS.

The city of Winchester in 1890 entered into a written contract with Wheeler & Parks, a co-partnership, by which it granted easements and rights in the streets and public squares of the city to Wheeler & Parks and their assigns for the construction and maintenance of water pipes, hydrants, etc., and by which contract Wheeler & Parks undertook to supply to the city and its inhabitants for public and private use for a period of twenty-five years water at prices not exceeding those named in the contract. The board of council of the city of Winchester had been authorized by an act of the Legislature of Kentucky to contract for a supply of water to be furnished to the city and its citizens; and the contract entered into by the city and Wheeler & Parks fixed a maximum charge for water to be furnished to the city and its inhabitants.

The Winchester Water Company was incorporated by an act of the Legislature of Kentucky approved May 10, 1890. This incorporation purchased from Wheeler & Parks, co-partners, all of their rights under the contract with the city of

Winchester by which they acquired the right to construct and maintain a plant to furnish water to the city and its citizens; and it assumed all of the obligations of Wheeler & Parks contained in the contract between them and the city.

In 1904 all of the rights and privileges of the Winchester Water Company were sold and conveyed to the appellee, Winchester Water Works Company; and it thus acquired all of the properties, privileges and easements originally granted to Wheeler & Parks; and it assumed all of the obligations of Wheeler & Parks under the contract with the city. The contract term expired in June, 1916.

The appellant, city of Winchester, acting by its mayor and board of council in June, 1916, adopted an ordinance by which it undertook to establish and regulate maximum charges for water furnished to the citizens for private use and to the city for public use; this ordinance contained a regular schedule of prices and for the purposes of this hearing was enacted after proper investigation and understanding of all of the facts and circumstances concerning the costs of furnishing water to the city and its inhabitants.

The bill and amended bill allege that at the time of the enactment of the ordinance the city

of Winchester did not have any authority, power, or right to pass or enforce any ordinance fixing the rates which the appellee might charge for furnishing water, because no power had been granted or delegated to the city of Winchester by the Legislature of Kentucky to fix rates to be charged for water furnished to the city or the inhabitants thereof; and the bill and amended bill then charge that the rates fixed by the ordinance of June 2, 1916, were so low that they would not produce revenues sufficient to maintain and operate the plant and pay interest and dividends, and that they were confiscatory and destructive of the property rights of the complainant.

At a preliminary hearing on August 10, 1916, it was agreed by counsel for appellant and appellee that the appellee might move to submit the case on the question raised by the bill and amended bill of the right of appellant by ordinance to fix rates to be charged for water in serving the city and its inhabitants; and such motion was then made and the case briefed and submitted thereon (Rec. p. 33); so the question here presented is:

Has the city of Winchester power and authority under its charter to fix and regulate charges for water furnished to the city and its inhabitants by the Winchester Water Works Company, a public service corporation?

Counsel for the appellant affirm that the charter of cities of the fourth class by express language and plain legislative intent delegate such authority to the board of council of cities of the fourth class in Kentucky. The words of the statute are sufficiently broad to comprehend such power —and they do delegate such power. The entire section shows that the legislature intended to delegate every police power to the board of council of cities of the fourth class, and among such powers, is the power to regulate and fix charges of water companies. We will quote only the pertinent portions of the section which are:

Kentucky Statutes:

"3490. The Board of Council, in addition to other powers herein granted, shall have power within the city:

(8) To provide the city with water, or erect, purchase or lease water works and maintain same, or to make all necessary contracts with any person or corporation for such purposes; to erect hydrants, cisterns, fire plugs and pumps in the street within or beyond the limit of the city.

(25) The board of council may grant the right-of-way over the public streets or public grounds of the city to any railroad company, or street railroad company, on such conditions as to them may seem proper, and shall have a supervising control over the use of same, and shall regulate the speed of cars and signals and fare on street cars; and under like condition and supervision may grant the right-of-way that may be

necessary to gas companies, water companies, electric light companies, telephone companies, or any like companies; and may compel any railroad company to erect and maintain gates at any or all street crossings, and to prevent railways from blocking or obstructing the streets or public ways of the city, and to fix penalties for the violation of these provisions: provided (the provisions here omitted have no application to the question.)

(30) The Board of Council shall have power, by ordinance, to prescribe the punishment by fine, not exceeding $100, or imprisonment not exceeding 60 days, of any person who shall molest, damage or interfere with any system of water works laid in said city, or the pipes and mains, hydrants or any part thereof, and shall have power to punish by ordinance and impose the same penalties as for damaging or molesting any other public property, and may, subject to the rules of any water company which may establish such system, select persons who shall have the right to open, tap, or make connection with such pipes or mains in the streets, alleys or public ways of said city.

(33) Said city council shall have legislative power to make by-laws and ordinances for the carrying into effect of all of the powers herein granted for the government of the city, and to do all things properly belonging to the police of incorporated cities. Said Board of Council may change the boundary line of any ward or wards of the city now divided into wards, or hereafter divided into wards, under the provisions of this act, not less than sixty days previous to any November election."

We have quoted the statute including the subsections to develop all of the provisions relative

to the delegation of legislative power over water companies to the Board of Council of cities of the fourth class. The specific provisions relied upon by appellant are contained in sub-section 25. These provisions we think are sufficient to delegate the power if they stood alone. We quote sub-section 33 to reflect the legislative intent and develop its purpose contained in sub-section 25. This sub-section 33 shows that the legislature intended to delegate to the Board of Council of cities of the fourth class the power "to do all things properly belonging to the police of incorporated cities."

We ask the court to keep in mind the scope of the entire statute, the meaning and purpose of the legislature in enacting it as developed by the legislative intent expressed in sub-section 33, while we attempt to speak directly to the provisions of sub-section 25. For convenience we quote:

"(25) The Board of Council may grant the right-of-way over the public streets or public grounds of the city to any railroad company or street railroad company, on such conditions as to them may seem proper, and shall have a supervising control over the use of same, and shall regulate the speed of cars and signals and fare on street cars; and under like condition and supervision may grant the right-of-way that may be necessary to gas companies, water companies, electric light companies, telephone companies, or any like companies; * * * "

(The balance of the sub-section is omitted here.)

By the first semi-colon clause power is conferred on the Board of Council to grant the right-of-way over the streets or public grounds of the city to any railroad company or street railroad company, on such "conditions as to them may seem proper"; the language includes a trunk railroad and a street railroad. The grant upon condition being authorized it is further provided that the council "shall have a supervising control over the use of same, and shall regulate the speed of cars and signals and fare on street cars"; the language shows that the supervising control over and regulating is in the future from the grant. The powers of the Board of Council over railroads and over street railroads are quite different. Yet the language in the sentence includes both of them; the legislative intent is reasonably plain as to each. It will be noticed that the "conditions" that may be imposed relate to the terms of the grant; and that the supervising and regulating are in the future from the grant, and relate to the use of the grant and streets of the city.

The second semi-colon clause in sub-section 25, the meaning being so close that it is not broken by a period, is: "and under like condition and supervision" may grant the right-of-way to water

companies and other like companies. In the last sentence the words: "under like condition and supervision" refer to all of the active words in the preceding sentence; that is, they name all the activities past, present or future, that are provided for by the words used in the first clause of the statute; these active words are: "conditions," "supervising control over," and "regulate." The word "condition" in the second clause of the statute includes everything that is meant by the word "conditions" in the first clause; and the word "supervision" includes everything that is meant by the words "supervising control over" and "regulate" in the first clause. The word "supervision" is the noun form of the verb "supervise." This word has been defined by the courts. In 37 Cyc. 604, the definition is: "to oversee; have charge of with authority to direct or regulate; to oversee for direction; to superintend; to inspect; to inspect with authority." If the word "supervise" means to direct or "regulate," then the word "supervision" names every activity of regulation, and it follows, that supervision used in the second semi-colon clause of the statute, names, includes, the activities under the word "regulate" used in the first semi-colon clause. Hence, the manifest content of the language used in the sub-section of the statute, without the aid of the legislative con-

struction contained in sub-section 33 of the statute, is a grant of power to the Board of Council of cities of the fourth class in Kentucky to regulate the rates of water companies and other like companies doing business in the cities.

The district court in analyzing the two clauses of the statute in its opinion, record 36, reaches the conclusion that the supervising control conferred by the statute is over the use of the streets and public grounds, apparently without regard to the grant itself; and we insist that the power delegated is full and complete and broad enough to cover fixing rates of public service water companies. The district court in its opinion (Rec. 37) substantially admits that the words of the statute are broad enough to cover the power claimed by the Board of Council when it enacted the ordinance, the subject of this litigation; but as a limitation upon the words used the court restricts the meaning of the language by what it conceives to be the legislative intent; it constructs a new set of clauses eliminating the regulating of fares entirely from the second clause in the statute, when such regulation of fares was one of the activities expressly provided for in the first clause. This is done by making the first sentence independent and holding that the regulation of fares relates to street railroads only, and by holding that the word "supervision" in the

second clause does not in fact include regulation of fares, though ordinarily it does so. And to justify this the court points out the fact that telephone rates could not be fixed by municipalities, because telephone companies do a business not wholly local. Yet, under the statute municipalities might regulate charges for local business. The legislative intent can best be learned by looking at the whole statute and not by analysis of a sentence or two standing alone. All of the provisions of the statute show that the legislature tried to delegate every "common governmental power." The words used and the spirit, legislative intent, coincide. This is the natural construction. The court finds for itself a legislative intent and makes it restrict the ordinary meaning of the words used. This is an unnatural construction.

The construction of the language of the statute by the district court is almost a parallel, though not so elusive, as that adopted by the district court in the case of *Owensboro v. Owensboro Water Company*, 191 U. S. 358 (48 Law Edition 217). In the Owensboro case Kentucky Statutes, Section 3290, sub-section 5, was under consideration. That case involved the right of the city to regulate charges for water, and involved the validity of an ordinance in all respects similar to the one in controversy here. In disposing of the Owensboro case this court said:

"The construction urged by appellee must therefore be rejected. There is a more natural one. The purpose of Section 3290 was to provide the inhabitants of the cities of the third class with the services mentioned—water, light, power, heat and telephone. They could be provided by the city directly, or they could be provided by private persons; but whatever way provided, the power was given to regulate the management and fix the rates of the services, and this was but the endowment of a common governmental power."

Approaching the provisions of Kentucky Statutes, Section 3490, having regard for the full meaning of the language used the city has power to enact the ordinance and fix rates to be charged for water; and construing the language of the statute as this court did in the Owensboro case you reach the same result.

In the Owensboro case the district court adopted a strict construction of the statute; the Supreme Court interpreted the language so as to give plenary power to cities of the third class in Kentucky in the regulation of rates of public service companies; and this court says such power is but the endowment of a common governmental function that the legislature had intended to bestow—and such should be the construction placed upon the statute under consideration.

Counsel for appellant make no complaint of the rules of law announced in the Owensboro

case, *supra*, or of the rules announced by Dillon on Municipal Corporations, fifth edition, quoted in the opinion of the district court, or of the rules announced in *St. Louis v. Bell Telephone Company*, 96 Mo. 623, or other cases cited by the district court.

Indeed, we insist that the municipality has no power to regulate the rates to be charged by water or other public service corporations in the absence of "express or plain legislative authority to do so." We affirm that in the instant case the municipality has been clothed by express words with plain legislative authority to regulate rates of water companies serving the fourth class cities of Kentucky. * * * There is an abundance of authority enforcing the right of municipalities to regulate water rates where the statute has delegated the authority to such municipalities—and we shall not tax the patience of the court to make citation. Such right is admitted by the appellee, if the statute in fact confers the authority.

The district court seems to have been considering the case at bar under the impression that "there is a touch of unfairness in the fact of the party served having power to determine the rate at which the service should be rendered." This seems to disregard the more substantial fact, that the court will not allow any unfairness in fixing the rates; and it seems to overlook the

fact that it is equally unfair to the multitude of people residing in fourth class cities for the government to leave them at the mercy of public service companies; and especially so after the expiration of contract relations under which maximum charges had been established by the company and the city.

The citation in the opinion, *United States Fuel & Gas Co. v. Commonwealth*, 159 Ky. 34, is not in point. In considering the powers conferred upon the Board of Council of cities of the fifth class in Kentucky the Court of Appeals of Kentucky held that no authority to fix rates had been conferred. An examination of the statute relative to cities of the fifth class shows that the legislature did not intend to confer many governmental powers on such cities; in fact, cities of the fifth class in Kentucky are mere hamlets and rarely need to regulate public service corporations—for no such service is offered to them. The district court in its opinion substantially admits (Rec. 38-39), that the *dictum*—it is nothing more—of the Court of Appeals of Kentucky in the United Fuel & Gas Company case relative to power to fix rates conferred on the larger cities of the state is in conflict with the more liberal rule announced by this court in the Owensboro case; and it in the instant case questions the construction adopted by this court in the Owensboro case and seems to agree

with the dictum of the Kentucky court in the United Fuel & Gas Company case. A reversal is asked.

Respectfully submitted,

J. Smith Hays, Jr.,
J. Smith Hays,
Winchester, Ky.,
Counsel for Appellant.

Of Counsel:

John M. Stevenson,
Winchester, Ky.,
James F. Winn,
Winchester, Ky.,
F. H. Haggard,
City Attorney, Winchester, Ky.

No. 51

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1919.

CITY OF WINCHESTER, APPELLANTS,

vs.

WINCHESTER WATER WORKS COMPANY,
APPELLEE.

Appeal from the District Court of the United States for the Eastern District of Kentucky, Covington Division.

BRIEF FOR APPELLEE.

BEVERLEY R. JOUETT,
Attorney for Appellee.

JAMES M. BENTON,
STEPHEN T. DAVIS,
Of Counsel.

October 15, 1919.

WESTERMANN-BRUTE CO. INCORPORATED, LOUISVILLE, KY.

POINTS AND AUTHORITIES.

The Board of Council of the city of Winchester had no authority on June 2, 1916, to pass the ordinance fixing the rates which water companies would be permitted to charge for water furnished the city and its citizens, because the Legislature of Kentucky had not granted such authority to the city.

Dillon on Mun. Corp., Vol. 3, Sec. 1325 and 89.
Lewis' Sutherland Stat. Const., Vol. 2, Sec. 493.
Eikhoff v. Charter Com. of Detroit, 142 N. W. 746.
People v. Douschc Evangelish, *et al.*, 249 Ill. 132.
Wabash Railroad v. U. S., 178 Fed. 5.
Consolidated Coal Co. v. Miller, 236 Ill. 149.
Jacksonville v. Southern Bell Telephone Co., 57 Fla. 49.
State v. Missouri Telephone Co., 189 Mo. 83.
State v. Sheboyogan, 111 Wis. 23.
In re Pryor, 29 L. R. A. 398.
Lewisville Nat. Gas Co. v. State of Indiana, 21 L. R. A. 734.
Bluefield Waterworks & Imp. Co. v. City of Bluefield, 33 L. R. A. (N. S.) 759.
Schtoeder v. Scranton Gas & Water Co., 20 Pa. Super Ct. 255.
St. Louis v. Bell Telephone Co., 2 L. R. A. 278.
Mills v. City of Chicago, 127 Fed. 731.
United Fuel & Gas Co. v. Comwealth of Ky., 159 Ky. 34.
Cumberland Tel. & Tel. Co. v. City of Memphis, 200 Fed. 657.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1918.

CITY OF WINCHESTER, - - - - - *Appellant,*

vs.

WINCHESTER WATER WORKS COMPANY, - *Appellee.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY, COVINGTON DIVISION.

BRIEF FOR APPELLEE.

This is an injunction suit brought by the Winchester Water Works Company against the city of Winchester to enjoin the latter from enforcing an ordinance prescribing the maximum rates which the company could charge.

STATEMENT.

The parties had a written contract for twenty-five years; but upon its expiration, in June 1916, the city council assumed the right to fix rates for the water company, and accordingly passed an ordinance prescribing a schedule of maximum rates. There-

upon the water company, a non-resident corporation, filed this injunction suit in the District Court of the United States upon two grounds: (1) that the city had no power to fix the rates; and (2) that the rates fixed were confiscatory. The court reached the conclusion that the first ground was good and accordingly made no decision of the second.

From this decision of the lower court holding that the city was without power to regulate these rates because the Legislature had not granted it any such power, the city brings this appeal.

We adopt the opening statement in the city's brief as to the question involved:

> "The question here for consideration is: Has the City of Winchester power under its charter as a city of the fourth class in Kentucky to fix and regulate charges for water furnished to the city and its inhabitants by a public service water company?"

It is not claimed that the city has this power unless the state has granted it, but appellant asserts that the Legislature of Kentucky has delegated this power to cities of the fourth class, of which Winchester is one. The contention of the appellant is thus stated in counsel's brief, page 6:

> "Counsel for the appellant affirm that the charter of cities of the fourth class by express language and plain legislative intent delegate such authority to the board of council of cities of the fourth class in Kentucky. The words of the statute are sufficiently broad to comprehend such power—and they do delegate such power."

This proposition is reiterated with special emphasis on page 14 of the city's brief, thus:

> "Indeed, we insist that the municipality has no power to regulate the rates to be charged by water or other public service corporations in the absence of '*express or plain legislative authority to do so.*' We affirm that in the instant case the municipality has been clothed by express words with plain legislative authority to regulate rates of water companies serving the fourth class cities of Kentucky."

The real question, therefore, turns upon the construction of the Kentucky statute. While counsel quote in their brief, at pages 6 and 7, Sec. 3490 of the Kentucky Statute, sub-sections 8, 25, 30 and 33, counsel state that the sub-section upon which they rely is number 25, the others being quoted "to reflect the legislative intent and develop its purpose."

Omitting the collateral sub-sections not actually relied upon, we quote Sec. 3490, sub-section 25, which appellant contends grants this power to cities of the fourth class—the class to which Winchester belongs:

> "3490. The Board of Council, in addition to other powers herein granted, shall have power within the city:
>
> * * * * * * * *
>
> "(25) The board of council may grant the *right-of-way over the public streets or public grounds of the city* to any railroad company, or street railroad company, *on such conditions* as to them may seem proper, and shall have a *super-*

NOTE—Italics are ours.

vising control over the use of same, and shall *regulate the speed of cars and signals and fare on street cars;* and under like *condition* and *supervision* may grant the right-of-way that may be necessary to gas companies, *water companies,* electric light companies, telephone companies, or any like companies;"

ARGUMENT.

The reasoning of the lower court in its written opinion is so unanswerable that it seems almost superfluous to discuss the question further. However, we offer these additional suggestions.

The nature of the legislative authority required to enable the city to regulate rates of this sort is thus stated in *Dillon on Municipal Corporations,* Vol. 3, Sec. 1325:

> "The city has no power to regulate the rates to be charged by water, lighting or other public service corporations, in the *absence of express or plain legislative authority to do so.*"

Sub-section 25, quoted above, is divided into two paragraphs, separated by a semi-colon. In the first the Legislature confers three distinct powers upon the city with reference to railroad companies: (1) to *grant the right-of-way* on proper conditions; (2) to have a *supervising control* over the use of the streets; and (3) to *regulate* the *speed of cars* and *signals* and *fare on street cars.*

The last paragraph, however, treating of *water companies* and other named public utilities, delegates

to cities in express terms the first two powers above mentioned, namely: the power to *grant the right-of-way*, and the power to *supervise* the use of the streets; but it does not grant, and therefore definitely withholds, the third power—*to regulate operation and charges*. In other words, when the Legislature came to consider gas, water, light and telephone companies, it definitely and distinctly confined the city's authority (1) to the matter of granting a right-of-way over the streets on conditions (necessarily imposed at the time), and (2) to its retaining a "supervising control over the use of same." This is necessarily the meaning, for the language of the second paragraph authorizes the grant of the right-of-way "under like conditions and supervision"—that is, the conditions and supervision provided for in the first paragraph with reference to the grant of the right-of-way for steam and street railroads.

Thus, not only is no power expressly given to fix or *regulate the charges* of water companies and the other public utilities therein mentioned, but the language of this section, under the familiar rule *expressio unius, exclusio alterius*, definitely forbids the implication of any such grant.

The general rule for the construction of municipal statutes is thus stated in Dillon on Municipal Corporations, Vol. 1, Sec. 89:

> "The rule of law is that a municipal corporation can exercise only such powers as are granted to it in express terms, or those neces-

> sarily or fairly implied in or incident to the powers expressly granted, or those that are essential and indispensable, not simply convenient, to the declared objects and purposes of the corporation. Any fair, reasonable doubt concerning the existence of the power is resolved by the courts against the corporation, and all acts beyond the scope of the powers granted are void."

The particular applicability of the rule of exclusion mentioned above is thus given in *Lewis' Sutherland Statutory Construction*, Vol. 2, Sec. 493:

> "Where a statute enumerates the persons or things to be affected by its provisions, there is an implied exclusion of others; there is then a a natural inference that its application is not intended to be general. Thus, where a statute enumerates cases in which a married woman may sue, she is limited to those cases. An act providing for levying the poor rate specified coal mines only, and it was therefore held that no other mines were ratable."

For convenient reference, we here give quotations from some of the leading cases of the country involving questions similar to the one here under consideration.

In *Eikhoff* v. *Charter Commission of City of Detroit*, 142 N. W. 746, the court said:

> "Where powers are specifically conferred by statute, they can not be extended by inference."

In *People* v. *Dousche Evangelish, et al.*, 249 Ill. 132, the court said:

> "An enumeration of certain specified things in a statute excludes all others not therein mentioned."

In *Wabash Railroad* v. *U. S.*, 178 Fed. 5, the Circuit Court of Appeals said:

> "Where a legislative body has made a grant with a specific limitation, and has made no other limitation, the conclusive presumption arises that it intended to make none."

In the case at bar the Legislature had given the right to the city to fix fares upon street railroads only, and no such right is expressly given as to any other utility, therefore the presumption is that the Legislature did not intend the city to have the right to fix fares or regulate rates as to any of the other utilities.

In *Consolidated Coal Co.* v. *Miller*, 2236 Ill. 149, the court said:

> "An enumeration of certain specified things in a statute excludes all others not mentioned therein."

But the city insists that the expression in the last paragraph, "under like condition and supervision," refers not only to *condition* and *supervision*, but to the *regulation of rates* as well. There is no warrant whatever for this extension of the statute's language. The conditions therein referred to evidently are conditions relating to the grant, such, for example, as the restoration of the streets to their former

condition, the agreement to maintain the street between the rails, etc. These conditions necessarily must have been a part of the franchise fixed at the time of its grant, as of course one party could not add conditions to an agreement after its execution.

The *supervision* provided for is described as "a supervising control over the use of same." The word "same" necessarily refers either to the right-of-way or to the public streets, but in either event it is a physical thing the use of which is to be supervised. Clearly it does not embrace the subject of rates.

Furthermore, the words "under like condition and supervision" relate back to steam railroads as well as street railroads; and yet it is not claimed that a city of the fourth class, under this language, acquires the right to regulate the rates of either steam railroads or street railroads. The important subject of the regulation of rates the Legislature saw fit to embody in a wholly separate and additional clause, and expressly applied it only to street railroads. If, then, the words under discussion did not give the power to regulate rates on steam railroads, a subject directly associated with street railroads, as to both of which the city was authorized to impose conditions and exercise supervision, *a fortiori* those words could be given no such meaning to water companies and the other public utilities mentioned in the second, a wholly different paragraph of the statute, where only the like condition and supervision is authorized, and where there is an express omission (as was true

with steam railroads, in the first paragraph) of any power to regulate rates.

Many cases have arisen in the various jurisdictions of the country where the effort has been made to construe general powers as authorizing this specific thing of fixing rates; but it is well settled, as said by Judge Cochran in his opinion, that "such and similar language does not grant to a municipality power to regulate the rates of public service corporations."

At the risk of doing something superfluous, we call attention to some of the principal cases of this character, including among them (in answer to the city's contention that the general welfare clause helps out) some of the cases which have served to establish the now well-known doctrine that general welfare clauses give no power to regulate rates.

In *Jacksonville* v. *Southern Bell Telephone*, etc., 575 Fla. 374, 49 So. 509, it is said:

> "A charter which confers upon the city authority to pass all ordinances necessary for the health, convenience and safety of the citizens, being simply a 'general welfare' clause, does not by implication empower the municipality to regulate rates."

A statute in Missouri gives the municipalities exclusive control over their public highways, streets, etc., and expressly authorizes the municipalities to provide—

> "for *regulating and controlling* the exercise by any person or corporation of any public franchise or privilege in any of the streets or public places of such city, whether such franchise or privileges have been granted by said city, or by or under the State of Missouri, or any other authority;"

but it was held in *State of Missouri, etc.*, v. *Telephone Co.*, 189 Mo. 83, 88, S. W. 41, that cities did not have, under that Act, the power to regulate telephone rates, the court saying:

> "Under the power (the power to regulate and control the private corporation in the use of the street) the city may regulate the planting of poles, wires, etc., or require the wires to be put under ground, or to do anything within reason to render *the use of the street* by the private corporation as little of injury to the public as may be. *But the section does not confer on the city the power to regulate the prices to be charged by the telephone company for its service to the inhabitants of the city.*

In *State* v. *Sheboygan*, 111 Wis. 23, 86 N. W. 657, it was held that under charter provisions empowering a city to enact proper ordinances and regulations for the government and good order of the city, for the benefit of trade and commerce, to prevent the encumbering of streets, and to regulate the manner of using streets and protect them from injury, the city had no power to impose any condition on the use of its streets by a telephone company, except such as might be said to be police regulations, and that it

could not require the company to accept an ordinance fixing the rate to be charged for telephone service.

In re Pryor, 55 Kan. 724, 41 Pac. 958, 49 Am. St. Rep. 280, 29 L. R. A. 398, the following section of the Kansas statute was under consideration:

> "Any gas or water corporation shall have full power to manufacture and sell and to furnish such quantities of gas or water as may be required by the city, town or village where located, for public or private buildings or for other purposes; and such corporations shall have power to lay pipes, mains and conductors for conducting gas or water through the streets, lanes, alleys and squares in such city, town or village, with the consent of the municipal authorities thereof and *under such regulations* as they may prescribe."

Construing it in connection with this question, the court said:

> "Certainly there is no express power conferred upon the municipal authorities by this section to regulate the price of gas or water. Under this section a gas or water company may lay its pipes and mains through the streets of a city only with the consent of the municipal authorities, and *under such regulations as they may prescribe;* but the regulations are only as to the laying of pipes and mains, and *having nothing to do with the price of the gas or water* passing through the pipes, and supplied to consumers."

In *Lewisville Natural Gas Co.* v. *State of Indiana*, 135 Ind. 49, 34 N. E. 702, 21 L. R. A. 734, the General Assembly of Indiana had granted the following power to the city of Lewisville:

> "Sec. 1.—Be it enacted by the General Assembly of the State of Indiana, that the board of trustees of towns, and the common councils of cities in this State, shall have power to provide, by ordinance, *reasonable regulations* for the safe supply, distribution and consumption of natural gas within the respective limits of such towns and cities, and require persons or companies to whom the privilege of using the streets and alleys in such towns and cities is granted for the supply and distribution of such gas to pay a reasonable license for such franchise and privilege."

The appellant had been supplying natural gas to the citizens of Lewisville, and the board of trustees attempted to fix, by ordinance, the price which the gas company should charge; but this power was denied, the Supreme Court of Indiana saying:

> "There is not a word or syllable to be found in the Act indicating that the General Assembly had in view any other purpose than that of securing the safe supply and use of natural gas. To secure the safe supply and use of natural gas is one thing, and to fix the price at which gas shall be supplied is another and quite a different thing. In our opinion, it was not the intention of the General Assembly to confer, by the Act above set out, the power to regulate the price at which natural gas should be furnishel."

In *Schroeder* v. *Scranton Gas & Water Co.*, 20 Pa. Super. Ct. 255, it was held that what is commonly known as the general welfare clause does not authorize a municipality to regulate by ordinance the rates

to be charged by a water company operating under a prior franchise.

To the same effect is the case of *St. Louis* v. *Bell Teleph. Co.*, 2 L. R. A. 278.

This case related to a prosecution against the Bell Telephone Company for the violation of an ordinance which provided that the annual charge for the use of the telephone in the city of St. Louis should not exceed $50.00, and a violation of the ordinance was made a misdemeanor, subjecting the offender to a fine of not less than $50.00 nor more than $500.00.

The Telephone Company contended that the power had not been delegated to the city of St. Louis to fix rates.

The Supreme Court, in stating the law, adopted the uniform rule as declared by Judge Dillon, saying:

> "Judge Dillon makes this full and comprehensive statement of the rule as to municipal powers: 'It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers and no others: (1) those granted in express words; (2) those necessarily or fairly implied in or incident to the powers expressly granted; (3) those essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable. *Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied.*"

The city of St. Louis claimed the right to fix the rates by ordinance by virtue of the fifth subdivision of Section 26, Article 3, of the charter of St. Louis, which is as follows:

> "The mayor and assembly have power to *license, tax and regulate* lawyers, doctors, etc., etc., telegraph companies as corporations, etc., and all other business, trade, avocations or professions whatever."

The court conceded that telephone companies were *ejusdem generis* with telegraph companies, but held that the statute in question did not give the city the power to fix rates.

The court then proceeded to discuss and dispose of the contention that the city was exercising a police power, or had the power to fix rates under the "General Welfare Clause" of its character, thus:

> "This brings in the general welfare clause, which is in these words: 'Finally, to pass all such ordinances, not inconsistent with the provisions of this charter or the laws of the State, as may be expedient, is maintaining the peace, good government, health and welfare of the city, its trade, commerce and manufacture, and to enforce the same by fines," etc.
>
> "Under a general power like the one now in question this court has held that the city may pass ordinances concerning vagrants, prohibiting persons from keeping open their places of business on Sunday, and prohibiting cruelty to dumb animals.
>
> "These matters are all within police regulations, strictly speaking, and naturally fall with-

in the domain of municipal legislation and regulation. *To say that under this general power the city may fix rates for telephone services would be going entirely too far.*"

In *Mills* v. *City of Chicago*, 127 Fed. 731, the city claimed the right to regulate the price of gas by virtue of the Illinois statute.

The opinion stated that the chief claim of the city was based on the statute (13th Section) authorizing the city to permit the erection of gas factories and the laying of pipes in the streets and alleys "*subject to such regulations as any such city may by ordinance impose.*" Of this contention the court said:

"The context shows that the last clause was not intended to confer upon the city council plenary power to regulate rates, as well as the manner in which gas factories should be erected and pipes laid down. The mere laying of gas pipe, and the installation of gas plants, together with their repair, are the subject-matter of a power widely separable in circumstance and in substance, from power to deal with the rates at which gas shall be manufactured and sold. The *first belongs naturally to the city whose streets are to be occupied*, for it is related intimately with the supervision of streets; *the latter, with equal reason, is foreign naturally to the city*, for the city is one of the parties in interest; and power to regulate prices ought not, in the usual course of affairs, to go to a party interested. Until there is *legislation, more unmistakable than the language used in this section*, to indicate a purpose to grant the city power to fix rates, I

shall not hold that such was the legislative intent."

In *United Fuel & Gas Co.* v. *Commonwealth*, 159 Ky. 34 (166 S. W. 783), the city council of Louisa passed an ordinance which provided that a gas company should not charge one citizen more than another, and imposed a fine of not less than $50.00 nor more than $100.00 for a violation of the ordinance. The city claimed that the right to pass such an ordinance was granted to it in Section 3637 of the Kentucky Statutes, sub-section 7, which is as follows:

> "*To carry out provisions of Chapter* —. To do and perform any and all acts and things necessary and proper to carry out the provisions of this chapter, *and to enact and enforce, within the limit of such city, all other local, police, sanitary and other regulations* as do not conflict with general laws."

It seems that the gas company had proposed to the inhabitants of Louisa to sell them gas at 20 cents a thousand feet if they would sign a contract for five years, but would charge persons who did not sign such contract 25 cents a thousand feet. Under the ordinance the gas company was fined $75.00, and appealed to the Circuit Court, insisting that the city could not regulate its rates and hence that the ordinance was void. The Court of Appeals of Kentucky in that decision laid down the rule for construing powers granted by the Legislature to cities of Kentucky. It said:

"There is nothing in the Act giving the city any power to make ordinances imposing fines upon corporations who discriminate improperly between their patrons. The ordinance granting the franchise is a contract between the city and the grantee of the franchise; and one part to a contract can not by his act impose a fine upon the other party for a violation of the contract, in the absence of some legislative authority to do so. In Dillon on Municipal Corporations Vol. III, Sec. 1325 (5th Ed.), it is said: 'Independently of a right *to regulate and control the rates* to be charged for public service reserved in a grant of a franchise or right to use the city streets, a *city or other municipality has no power to regulate the rates to be charged by water, lighting, or other public service corporations, in the absence of express or plain legislative authority to do so.*' See, also, Wyman on Public Service Corporations, Vol. 2, Sec. 1410; Old Colony Trust Company v. Atlanta (C. C.), 83 Fed. 39; Bluefield Water Works Co. v. Bluefield, 69 W. Va. 1, 70 S. E. 772, 33 L. R. A. (N. S.) 759; St. Louis v. Bell Telephone Co., 96 Mo. 623, 10 S. W. 197, 2 L. R. A. 278, 9 Am. St. Rep. 370.

"We do not deem it necessary to consider whether the gas company discriminates against consumers in the city, or to pass upon the question whether it has violated the terms of the franchise. This question may be determined in a civil action in a court of competent jurisdiction. We only now determine that the ordinance is void for want of authority in the city to enact it; and, that being void, it is a nullity, and, being a nullity, no judgment for a fine may be imposed upon the defendant under it."

Thus the Court of Appeals of Kentucky held that this "general welfare clause" did not authorize the

council to enact its ordinance imposing a fine upon the gas company. The city claims that this decision is dictum, but Judge Cochran in his opinion says it is controlling on him (Rec., p. 35).

The case of the *Cumberland Telephone & Telegraph Co.* v. *City of Memphis*, 200 Fed. 657, decided December 3, 1912, by the Sixth Circuit, was one in which the telephone company had sought an injunction against the city of Memphis to restrain it from fixing telephone rates upon the ground "that the ordinance was void for lack of power in the municipal council to legislate on the subject." The lower court decided that the power was vested in the council, but the Court of Appeals reversed this decision and held that the city had no such power. In the opinion Judge Denison stated the question at issue as follows:

> "The question, then, is whether a grant of this power from the State to the city of Memphis can be found in the words of, or by proper implication from, any existing statute. That it is not stated in express words is conceded, and so it must be found, if at all, included in the broad terms of some general language or by implication in connection with other provisions."

The sections of the legislative Acts upon which the council relied as giving this authority were Sections 3 and 4 of Chapter 11 of the Acts of 1879.

In Section 3, after granting to the city certain enumerated powers, it was further provided that it—

> "shall have power over all other affairs in the taxing district in which the peace, safety and general welfare of the inhabitants is interested;"

and, by Section 4, the municipal legislative council was—

> "vested with the power and charged with the duty of *making all laws or ordinances not inconsistent with the general laws, for every object, matter and subject within the local government instituted by this Act*"

The court considered these two clauses together, and in laying down the rule of construction applicable to municipal charters said:

> "It is the accepted theory of construction as applied to municipal charters that the statute specifies with reasonable particularity the powers granted, and thus limits and defines the municipal government established, and that 'general welfare' and similar clauses are intended to operate, and do operate, only so far as necessary to carry out and effectuate the specific grants."

It appears from the decision that in 1903 the municipal charter of Memphis was amended, and the legislative powers of the municipality in reference to analogous subjects were declared to be as follows:

> "The legislative council of such taxing district is hereby vested with the power and authority to fix and regulate, from time to time, within reasonable limits, *the scale of charges* for the product of service of all district telegraph com-

> panies, gas companies, street car companies, belt line companies, switching companies, now or hereafter enjoying or operating any rights or privileges to use or occupy any of the streets, alleys or public grounds within the territory of such taxing district."

The court then held that a statute which is amended is thereafter to be treated and construed as if the amendment had always been there, and said:

> "Applying this rule, we find that, whatever construction might otherwise be given to broad and general language in the charter, it specifically grants this particular power of rate regulation with regard to other companies of the same general clause, and that in this enumeration of analogous public service companies telephone companies are not mentioned. No reason is suggested why this specific mention was necessary as to telegraph or electric light companies, and not neecssary as to telephone companies, and apparently this omission must be the result of a deliberate legislative intent to reserve and not to grant the power of rate regulation for telephone companies. Seldom is there a case so clearly calling for the application of the maxim "*inclusio unius*, etc."

Just so with the case at bar. In the Kentucky statute the right to fix fares on street railroads is expressly and specifically given, but nothing is said as to the right to fix or regulate the water rates.

Further citation of authorities would be a useless consumption of time, as they are all to the same effect and show conclusively that the city of Winchester had no authority on June 2, 1916, to pass any ordinance fixing the rates which water companies should charge for water furnished the city and its citizens, since no such authority at that time had been granted it by the Legislature.

We earnestly ask an affirmance.

Respectfully submitted,

BEVERLEY R. JOUETT,

Attorney for Appellee.

JAMES M. BENTON,

STEPHEN T. DAVIS,

Of Counsel.

Oct. 15, 1919.

CITY OF WINCHESTER ET AL. *v.* WINCHESTER WATER WORKS COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

No. 51. Argued October 24, 1919.—Decided January 5, 1920.

A city cannot regulate the rates chargeable by a water company unless authority to do so has been plainly granted by the legislature. P. 193.

Such authority cannot be implied from powers to grant water companies rights of way in the public streets and grounds and to supervise and control their use. P. 194.

Kentucky Statutes, § 3490 (8), (25), (30), (33), considered. *Id.*

Affirmed.

THE case is stated in the opinion.

Mr. J. Smith Hays, with whom *Mr. J. Smith Hays, Jr.*, *Mr. John M. Stevenson*, *Mr. James F. Winn* and *Mr. F. H. Haggard* were on the brief, for appellants.

Mr. Beverley R. Jouett, with whom *Mr. James M. Benton* and *Mr. Stephen T. Davis* were on the brief, for appellee.

MR. JUSTICE DAY delivered the opinion of the court.

The Winchester Water Works Company filed its bill in the United States District Court for the Eastern District of Kentucky seeking to enjoin the enforcement of an ordinance establishing maximum rates for water to be furnished the city for public use and to the people thereof for private use. By the bill and amended bill it was charged that the city had no authority to pass or enforce an ordinance fixing such rates, because (1) no power had been granted to the city so to do by the legislature of Kentucky; (2) because the rates established were so low as to be confiscatory in their character, and, consequently, the ordinance was violative of rights secured to the company by the Fourteenth Amendment to the Federal Constitution. An answer was filed, and the court decided the case and made a final decree in favor of the company upon the ground that under the laws of Kentucky the city had no authority to pass or enforce an ordinance fixing rates. The court found it unnecessary to pass upon the question of the confiscatory character of the rates. The bill invoked jurisdiction upon a constitutional ground, and the case was brought here by direct appeal.

It appears that the company had a contract with the city, which expired in 1916, and thereafter the ordinance in controversy was passed. That a city has no power to regulate rates of this character unless it has legislative authority so to do is established, and does not seem to be disputed by the appellants. "Independently of a right to regulate and control the rates to be charged for public service reserved in a grant of a franchise or right to use the city streets, a city or other municipality has no power to regulate the rates to be charged by water, lighting, or

other public service corporations in the absence of express or plain legislative authority to do so." 3 Dillon on Municipal Corporations, 5th ed., § 1325. Nor does such authority arise from the power to regulate the opening and use of streets, nor a grant of the general right to control and regulate the right to erect works and lay pipes in the streets of the city. *State* v. *Missouri & K. Telephone Co.*, 189 Missouri, 83; *Jacksonville* v. *Southern Bell Tel. Co.*, 57 Florida, 374; *Lewisville Natural Gas Co.* v. *State*, 135 Indiana, 49; *Mills* v. *Chicago*, 127 Fed. Rep. 731; *State* v. *Sheboygan*, 111 Wisconsin, 23.

Bearing this general principle in mind, we come to examine the sections of the laws of Kentucky which, it is insisted, give the authority to fix water rates. The appellants insist that this power is expressly conferred in subsection 25 of § 3490 of the Kentucky Statutes, which reads as follows: "The board of council may grant the right of way over the public streets or public grounds of the city to any railroad company or street railroad company, on such conditions as to them may seem proper, and shall have a supervising control over the use of same, and shall regulate the speed of cars and signals and fare on street cars; and under like condition and supervision may grant the right of way that may be necessary to gas companies, water companies, electric light companies, telephone companies, or any like companies; and may compel any railroad company to erect and maintain gates at any or all street crossings, and to prevent railways from blocking or obstructing the streets or public ways of the city, and to fix penalties for the violation of these provisions: *Provided*, etc."

Other subsections claimed to be applicable are given in the margin.[1]

[1] Kentucky Statutes:

"3490. The board of council, in addition to other powers herein granted, shall have power within the city: . . .

Examining subsection 25, we are unable to discover any grant of authority to fix the rates for water consumption. It is therein first provided that the council may grant the right-of-way over the public streets to any railroad or street railroad company on such conditions as to the council may seem proper, and shall have a supervising control over the use of the same, and the council is given the right to regulate the speed of cars and signals and fare on street cars, and under like conditions and supervision, the council may grant the right-of-way to water companies among others. This language is certainly very far from that express authority to regulate rates, which is essential in order to enable municipalities so to do. The power to grant a right-of-way to water companies is specifically granted, and this under like conditions and supervision already provided as to railroad and street

"(8) To provide the city with water, or erect, purchase, or lease water-works and maintain same, or to make all necessary contracts with any person or corporation for such purposes; to erect hydrants, cisterns, fire-plugs and pumps in the streets within or beyond the limits of the city. . . .

"(30) The board of council shall have power, by ordinance, to prescribe the punishment, by fine, not exceeding $100, or imprisonment not exceeding 60 days, of any person who shall molest, damage or interfere with any system of water-works laid in said city, or the pipes and mains, hydrants, or any part thereof, and shall have power to punish by ordinance and impose the same penalty as for damaging or molesting any other public property; and may, subject to the rules of any water company which may establish such system, select persons who shall have the right to open, tap or make connection with such pipes or mains in the streets, alleys, or public ways of said city. . . .

"(33) Said city council shall have legislative power to make by-laws and ordinances for the carrying into effect of all of the powers herein granted for the government of the city, and to do all things properly belonging to the police of incorporated cities. Said board of council may change the boundary line of any ward or wards of any city now divided into wards, or hereafter divided into wards, under the provision of this act, not less than sixty days previous to any November election."

railroad companies. This is the full measure of the grant of authority to deal with water companies. The right to regulate fares is in the same sentence which grants authority to deal with water companies, and is specifically limited to fares on street cars.

Nor do we find in other subsections of this section any provision from which the right to fix the rates of water companies can be inferentially deduced.

Counsel call to our attention but one case from Kentucky, whose court of last resort is final authority upon the construction of the statutes, and that is *United Fuel & Gas Co.* v. *Commonwealth*, 159 Kentucky, 34. There the United Fuel and Gas Company held a franchise from a city in Kentucky under an ordinance providing that the grantee of the franchise should furnish for public and private use for the city and its inhabitants natural and artificial gas at a reasonable price not exceeding in any event one dollar per one thousand cubic feet, and that the grantee in delivering gas should not discriminate against the consumers in the city. The company proposed to sell gas to the inhabitants of the city at 20 cents per thousand feet if they would sign a contract for five years, but it charged persons who did not sign such a contract 25 cents a thousand feet. The city council passed an ordinance providing that a gas company should not charge one citizen more than another, and imposed a fine for violation of the ordinance. The city was of the fifth class, and was given authority to make "all other local, police, sanitary and other regulations as do not conflict with general laws." The court held that the act for the government of this city of the fifth class must be read in connection with the statutes conferring power on larger cities, and, that thus construed, there was no grant of authority to the city to impose a fine such as the one in question in the absence of legislative authority so to do. The section from Dillon on Municipal Corpora-

tions, stating that the authority of a municipality to regulate rates to be charged by public service corporations is limited to cases in which express or plain legislative authority has been given was quoted with approval. Cases from other States in which the principle has been approved were also cited.

It is true that this case is not precisely in point, but it contains a recognition by the Court of Appeals of Kentucky of the accepted principle that the right to fix rates must be granted to municipal corporations by a plain expression of legislative authority. It is said, however, that our decision in *Owensboro* v. *Owensboro Waterworks Co.*, 191 U. S. 358, holds a contrary view. So far as apposite that case dealt with the power of a city of the third class to fix rates for water consumers. As to cities of that class, § 3290 of the Kentucky Statutes specifically provides authority to provide the city and inhabitants thereof with water, light, etc., service by contract or by works of its own, and to make regulations for the management thereof, and to fix and regulate the price to consumers and customers. Dealing with that section, and the authority conferred upon cities of the third class, this court said: "The purpose of section 3290 was to provide the inhabitants of cities of the third class with the services mentioned—water, light, power, heat and telephone. They could be provided by the cities directly or they could be provided by private persons; but whatever way provided, the power was given to regulate the management and fix the rates of the services, and this was but the endowment of a common governmental power."

This language was used in regard to the authority given in express terms to fix rates. It was said of such authority that it was but the endowment of a common governmental power. This is undoubtedly true. But it is equally certain that the governmental power rests with the State, and must be conferred upon the municipality

in an unmistakable way. We find nothing in the *Owensboro Case* which at all conflicts with the construction which we have given to § 3490, applicable to cities of the fourth class to which the City of Winchester belongs.

Finding no error in the judgment of the District Court, the same is

Affirmed.